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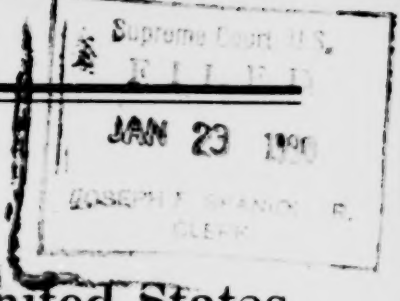

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

11126 BALTIMORE BLVD., INC.
(T/A WARWICK BOOKS),

Petitioner,

v.

PRINCE GEORGE'S COUNTY, MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

I. DOES THE PRINCE GEORGE'S COUNTY ADULT BOOK STORE LAW CONSTITUTE AN UNREVIEWABLE PRIOR RESTRAINT FORBIDDEN BY THE FIRST AMENDMENT, BECAUSE IT GRANTS UNFETTERED DISCRETION TO ZONING OFFICIALS AND IS SUBJECT TO POSSIBLE MANIPULATION AND ARBITRARY APPLICATION BY THOSE WHO MIGHT OBJECT TO THE CONTENTS OF THE MATERIAL SOLD AT ADULT BOOK STORES, IN THAT THE CRITERIA FOR A ZONING LICENSE REQUIRE AN APPLICANT TO DEMONSTRATE THAT THE PROPOSED USE IS IN HARMONY WITH THE ZONING PLAN AND DOES NOT SUBSTANTIALLY IMPAIR THE INTEGRITY OF THE MASTER PLAN OR ADVERSELY AFFECT THE HEALTH, SAFETY OR WELFARE OF RESIDENTS OR WORKERS IN THE AREA OR IS DETRIMENTAL TO THE USE OR DEVELOPMENT OF ADJACENT PROPERTIES OR THE GENERAL NEIGHBORHOOD?

II. DOES THE PRINCE GEORGE'S COUNTY ADULT BOOK STORE ZONING LAW IMPOSE AN UNREVIEWABLE PRIOR RESTRAINT FORBIDDEN BY THE FIRST AMENDMENT, BECAUSE IT REQUIRES AN APPLICANT FOR A ZONING LICENSE FOR AN ADULT BOOK STORE TO OBTAIN A SPECIAL EXCEPTION THROUGH A MULTI-TIERED ADMINISTRATIVE PROCESS THAT REQUIRES THE APPLICANT TO SUSTAIN THE BURDEN OF PROOF BY SUBSTANTIAL EVIDENCE AT AN ADVERSARY, PUBLIC HEARING AT WHICH ANY MEMBER OF THE COMMUNITY CAN APPEAR AS AN INTERESTED PERSON WITH STANDING IN THE PROCEEDING TO OFFER EVIDENCE AND OPPOSE THE APPLICATION?

QUESTIONS PRESENTED (continued)

III. DOES THE PRINCE GEORGE'S COUNTY ADULT BOOK STORE ZONING ORDINANCE IMPOSE AN UNREVIEWABLE PRIOR RESTRAINT FORBIDDEN BY THE FIRST AMENDMENT, BECAUSE IT REQUIRES AN APPLICANT FOR A ZONING LICENSE FOR AN ADULT BOOK STORE TO OBTAIN A SPECIAL EXCEPTION THROUGH A MULTI-TIERED ADMINISTRATIVE PROCESS THAT IMPOSES NO TIME LIMITATION UPON THE DECISION MAKING PROCESS AND HAS NO MECHANISM FOR PROMPT JUDICIAL REVIEW?

IV. DID PRINCE GEORGE'S COUNTY MEET THE STANDARDS OF UNITED STATES V. O'BRIEN, 391 U.S. 367 (1968) AND RENTON V. PLAYTIME THEATRES, 475 U.S 41 (1986), BY RELYING UPON EVIDENCE COLLECTED FOR USE IN THIS CASE AND NOT PRESENTED TO THE COUNTY COUNCIL BEFORE IT ENACTED ITS ADULT BOOKSTORE ZONING LAW?

V. DID PRINCE GEORGE'S COUNTY MEET THE STANDARDS OF UNITED STATES V. O'BRIEN, 391 U.S. 367 (1968), BY DEMONSTRATING THAT THE SPECIAL EXCEPTION REQUIREMENT IN THE PRINCE GEORGE'S COUNTY ADULT BOOKSTORE ZONING LAW SERVES A SIGNIFICANT STATE INTEREST AND IS NARROWLY DRAWN SO AS TO RENDER ANY INCIDENTAL RESTRICTION UPON FIRST AMENDMENT FREEDOMS NO GREATER THAN NECESSARY?

QUESTIONS PRESENTED (continued)

VI. DID PRINCE GEORGE'S COUNTY MEET THE STANDARDS OF UNITED STATES V. O'BRIEN, 391 U.S. 367 (1968), BY DEMONSTRATING THAT THE AMENDMENT TO THE PRINCE GEORGE'S COUNTY ADULT BOOKSTORE ZONING LAW, WHICH REVOKED THE "GRANDFATHER" STATUS THAT PREVIOUSLY HAD BEEN AFFORDED NON-CONFORMING ADULT BOOK STORES PREEXISTING THE ENACTMENT OF THE PRINCE GEORGE'S COUNTY ADULT BOOKSTORE ZONING LAW, SERVES A SIGNIFICANT STATE INTEREST AND IS A REQUIREMENT NARROWLY DRAWN SO AS TO RENDER ANY INCIDENTAL RESTRICTION UPON FIRST AMENDMENT FREEDOMS NO GREATER THAN NECESSARY?

LIST OF PARTIES

The parties are:

1. 11126 BALTIMORE BOULEVARD, INC. T/A WARWICK BOOKS[1]

2. PRINCE GEORGE'S COUNTY, MARYLAND

3. CARY W. GREENE AND PAUL F. MALONE[2]

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[1] 11126 Baltimore Boulevard, Inc. T/A Warwick Books has no parent, subsidiary or affiliated companies or corporations.

[2] Cary W. Greene and Paul T. Malone, T/A Deslico, a Joint Venture, the Plaintiff's landlord, were named as parties in the complaint but have not participated in this case.

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SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1989

11126 BALTIMORE BLVD., INC.
(t/a Warwick Books)

PETITIONER,

v.

PRINCE GEORGE'S COUNTY, MARYLAND

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, 11126 Baltimore Blvd., Inc. t/a Warwick Books, requests that the Supreme Court of the United States grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above captioned proceeding on October 10, 1989.

REFERENCE TO OPINIONS BELOW

The opinions below were reported: 11126 Baltimore Boulevard v. Prince George's County, 684 F.Supp. 884 (D.Md. 1988)(APX. 74-147),[3] rev'd 886 F.2d 1415 (4th Cir. 1989). APX. 1-68.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit for which Petitioner seeks review was entered on October 10, 1989. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Court of Appeals filed its first opinion on September 28, 1989. The Court

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[3] The designation APX refers to the pages of the Appendix.

filed an amended opinion on October 10, 1989. APX. 74-147. Upon consideration of Appellee's motion to amend the judgment,[4] the Court filed an order on October 19, 1989 that the date of October 10, 1989 was substituted for that of September 28, 1989 as the date of filing for the amended opinion. APX. 69. On October 23, 1989, Petitioner filed a Petition for Rehearing and Suggestion For Rehearing in Banc, which was denied by an order filed on October 25, 1989. APX. 70.

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[4] On October 2, 1989, Petitioner's counsel advised the Court of Appeals that pages of the opinion were missing and was in turn advised by the court that an amended opinion would be forthcoming. Petitioner filed the motion to amend judgment on October 5, 1989 and requested that the date of judgment be entered as of the date of the amended opinion and that all times triggered under Fed. R. App. P. 35, 40 and 41 run from such time as the Court issued an amended opinion.

PERTINENT CONSTITUTIONAL PROVISIONS AND LOCAL ORDINANCES

The ordinance called into question in this case is Prince George's County ordinance CB 116-1980, codified in Prince George's County Code §§ 27-107.1(a)(6), 27-248, 27-317, 27-331. The text of these provisions is set forth in the appendix. APX. 6-9.

STATEMENT OF THE CASE

On April 18, 1988, the District Court entered judgment declaring unconstitutional those portions of the Prince George's County zoning code pertaining to adult bookstores on the basis that these provisions violated the First Amendment.[5] APX. 72-73. The

[5] Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331, 1343. Plaintiff sought declaratory and injunctive relief based on 42 U.S.C. § 1983 for the abridgment of First

District Court held that the Prince George's County Code §§ 27-107.1(a)(6), 27-331 and 27-248 were not supported by sufficient evidence in the legislative record and, therefore, did not comport with the four prong test required under United States v. O'Brien, 391 U.S. 367 (1968). APX. 110-129, 145. The District Court also held that the provisions of Prince George's County Code § 27-317, which contains requirements for obtaining a special use permit, were overly broad as applied to adult book stores in that its provisions granted unfettered discretion to zoning officials in the context of the First Amendment, and

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Amendment rights. The parties filed cross motions for summary judgment and agreed that the court should determine all questions of fact and law on the basis of the submissions in support of their respective motions.

thereby were "subject to possible manipulation and arbitrary application by officials who might object to the contents of the material sold at adult book stores." APX. 129-145. The Court of Appeals reversed and held the law constitutional. It disagreed on both grounds relied upon by the District Court. The Court of Appeals also concluded, as the District Court did, that the licensing process was not a prior restraint, even though the law did not provide any time limits for the decision making process or for expeditious judicial review.[6] APX. 62n.8, 62-64, 143n.31.

On November 18, 1975, Prince

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[6] This issue was raised before both the District Court and the Court of Appeals. Both court rejected Petitioner's contention.

George's County enacted its first adult bookstore zoning ordinance (Bill No. CB-156-1975). The ordinance provided that book, newspaper, and magazine stores, except adult bookstores, were uses permitted in local and general commercial zones. Adult bookstores, however, were permitted only as special exception uses in these commercial zones.[7] The ordinance prohibited adult bookstores within a thousand feet of any school building or five hundred feet of any church. It imposed operating

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[7] The purpose of a zoning law is to devote general areas or districts to selected uses. When a use district is established, the zoning law prescribes that certain uses are permitted as a matter of right. These are termed permitted uses. Uses which do not fall within those established for a district and are permitted under certain conditions are termed conditional or special exception uses.

restrictions in order to lessen their impact on the community: an adult book store must prevent its interior from being viewed from its exterior, limit its outside displays and advertising to one sign and permit access only to persons above the age of eighteen years. The ordinance defined adult bookstores as "[a]ny commercial establishment that had twenty-five percent (25%) or more of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations" of a sexually explicit nature and did not "qualify as a theatre or nonprofit free lending library." The ordinance exempted from its provisions any adult book store that was in existence prior to its enactment, provided that the pre-existing book store complied with the

operational restrictions imposed on adult book stores. APX. 78-83, 149-52.

On April 6, 1976, Prince George's County enacted Bill No. CB-10-1976, which increased the 500 foot distance restrictions for places of worship to 1000 feet. On November 16, 1976, Prince George's County enacted Bill No. CB-104-1976 to clarify the definition of non-conforming uses in the County zoning code and to modify the code provisions for their continuation. It also provided for the continuation of the "grandfather" status afforded to any pre-existing adult book store, provided it comply with the operation restrictions imposed on adult book stores. APX. 83-84, 157.

Plaintiff had operated its store in a general commercial zone since June 17, 1975 and had been permitted to operate as

a non-conforming bookstore pursuant to the "grandfather" provisions in Ordinances CB 156-1975 and CB 104-1976. On November 5, 1980, however, Prince George's County enacted Bill No. CB-116-1980. It rescinded the "grandfather" status afforded to adult book stores pre-existing ordinance CB 156-1975. Ordinance CB-116-1980 redefined adult bookstore by reducing the amount of non-adult stock from 25% to 5% and provided for the regulation of any store with one or more mechanical viewing devices. It also provided that pre-existing adult bookstores could continue in operation until July 1, 1985, after which an adult bookstore could only continue in operation pursuant to a special exception for an adult bookstore. The distance and operation restrictions were continued.

APX. 5.

Prince George's County ordinance 116-1980 has been codified in the Prince George's County Code. County Code §§ 27-317(a) provides that an applicant for a special exception to operate an adult bookstore must demonstrate that the proposed use will be in harmony with the zoning plan and not substantially impair the integrity of the Master Plan or adversely affect the health, safety or welfare of residents or workers in the area or be detrimental to the use or development of adjacent properties or the general neighborhood. APX. 7-8. Specifically enumerated "[a]s part of the Special Exception approval" process for adult bookstores, County Code § 27-331(a)(2) provides that the County may restrict advertisement, outdoor displays

and the location of merchandise of stores and "may impose [on adult bookstores] other reasonable requirements deemed necessary to safeguard the health, safety, morals, and general welfare of the community." APX. 9. The foregoing criteria are in addition to those in Prince George's County Code Section 27-331(a)(1), (3) and 27-248(c), which contain the specific distance and operational restrictions that apply to adult book stores.[8] APX. 6, 9.

The special exception applicant must demonstrate that the proposed use meets all of the requirements of the ordinance by substantial evidence and that there is

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[8] By contrast to the requirements in Code §§ 217(a), 27-331(a)(2), Code §§ 27-331(a)(1), (3) and 248(c) are sufficiently specific and objective for First Amendment purposes.

no substantial evidence to the contrary. The applicant must meet this burden throughout various stages of administrative scrutiny. The application is first reviewed for compliance by the Technical Staff in the Zoning Division of the Planning Commission. The Technical Staff then issues a report recommending approval, conditional approval, or denial of the application. The Prince George's County planning board may then review and modify the technical staff report. The special exception application must then be reviewed in a public hearing before a Zoning Hearing Examiner. The property must be posted with notice of the application for a special exception. Public notice is also given in the newspapers. APX. 10, 62-64.

The hearing is adjudicatory, with witnesses being sworn and subject to cross-examination. Testimony and argument are recorded. Parties for and against an application are often represented by counsel. An appointed People's Zoning Counsel is also present to represent the community. The Zoning Hearing Examiner then files a written decision. Within thirty days after the filing of the zoning Hearing Examiners final decision, any person who entered his name in the record as a party may appeal to the Prince George's County Council, sitting as the District Council for the Maryland-Washington regional district. The District Council on its own motion may choose to hear the case. If there is no appeal within a thirty day period, the Zoning Hearing Examiner's

decision becomes final.

If the District Council decides by a majority vote to hear the case, then the Council will hear oral argument and review the administrative record before its final decision. The Council is required to make a final decision in each special exception case based on the evidence in the administrative record and support it with written findings of fact and conclusions. The Council may affirm and adopt the Hearing Examiners' decision or may reverse or modify it. The District Council decision may be appealed to the Circuit Court for Prince George's County, which will review the Council's decision to determine whether its findings and conclusions are supported by the administrative record. The standard applied on appeal is that the District

Council's decision is to be affirmed, unless there is no evidence to support its decision or that a reasonable person could not reach a different conclusion regarding the evidence. There are no time limits imposed on the decision making process. An appeal may be filed in the courts. The process of administrative and judicial review can take over three years. APX. 10, 62-64, 143.

The special exception can be revoked, modified, suspended, or additional conditions imposed upon petition to the District Council by the County's Director of the Department of Licenses and Permits. A public hearing is then held by the Zoning Hearing Examiner on the petition. All persons of record at the time of the special

exception approval process are included in the required notification. All pertinent information concerning the petition is made available for public examination prior to the public hearing. The Planning Board or Technical Staff may submit recommendations and materials. After the Hearing Examiner's decision has been filed, the District Council may then revoke, modify, suspend or impose additional conditions.

ARGUMENT

The decision of the Court of Appeals in this case conflicts with those of the First, Fifth, Sixth, Seventh and Eighth Circuits on the matters in issue. It conflicts with a decision of the Court of Special Appeals of Maryland on one of the very same issues decided in this case concerning the very same zoning law. The

decision of the Court of Appeals in this case conflicts with the applicable decisions of this Court concerning the criteria and procedures for the issuance of licenses to adult book stores and other circumstances when speech is involved.

The decision of the Court of Appeals, that the special use criteria and procedures for adult book stores in the Prince George's County Code "do not offend the First Amendment by granting undue and arbitrary discretion" (APX. 55-68), conflicts with decisions of the First and Seventh Circuits.[9] In Fantasy

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[9] See also 15192 Thirteen Mile Rd. v. Warren, 593 F. Supp. 147, 156 (E.D. Mich., S.Div. 1984)(invalidated portions of adult bookstore ordinance on ground that it lacked time limits to govern application process and had indefinite general standards); Amico v. New Castle County, 571 F. Supp. 160, 171-73 (D.Del. 1983)(invalidated zoning

Book Shop v. City of Boston, 652 F.2d 1115, 1121-24 (1st Cir. 1981), the Court held that a criterion that allowed denial of an application for an adult bookstore if a license "otherwise significantly harmed[s] the legitimate predictable interests of the affected citizens of the city" was facially invalid on First

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ordinance that permitted adult book store use permit to be denied, if it detrimentally affected the neighborhood); Evansville Book Mart v. City of Indianapolis, 477 F.Supp. 128 (S.D.Ind., Indianapolis Div. 1979)(licensing ordinance for an adult book store lacked narrow, definite and objective standards to guide zoning officials in considering the effect of the busiress on surrounding property and residents); City of Imperial Beach v. Palm Island Books, 115 Cal. App.3d 134 (1981)(holding adult book store ordinance vague, uncertain and overly broad because its criteria required its proposed use to contribute to the general well-being of the neighborhood and community and not be detrimental to health, safety or general welfare of persons residing or working in the vicinity or be injurious to property or improvements in the vicinity).

Amendment grounds for vagueness and overbreadth. In Entertainment Concepts v. Maciejewski, 631 F.2d 497, 504-05 (7th Cir. 1980), the court expressed "doubt[s] that any special use scheme for regulation of adult movie theatres would be constitutionally valid because of the prior restraint involved." Id., at 504. The only criteria referred to in the ordinance was the "possible damaging influence on the neighborhood", and the court invalidated the ordinance since it was not narrowly drawn and gave zoning officials unbridled discretion to grant or deny the special use. Similarly, the court, in Genusa v. City of Peoria, 619 F.2d 1203, 1217-19 (7th Cir. 1980), invalidated an adult book store zoning ordinance because it required an applicant's premises to pass various

municipal inspections prior to licensure that were not required for non adult bookstores.

The decision of the Court of Appeals directly conflicts with the decision of this Court in FW/PBS, Inc. v. City of Dallas, 58 U.S.L.W. 4079 (U.S. Jan. 9, 1990) (licensing schemes for adult establishments, including adult book stores, must provide reasonable time limits for the decision making process and for expeditious judicial review). The Prince George's County zoning law makes no provision for a time limit to the application process for a special exception or for expeditious judicial review. APX. 63-64, 143. The decision of the Court of Appeals concerning the special exception criteria otherwise appears to conflict with the principles

articulated by this Court concerning the standards and procedures for the issuances of licenses when speech is involved. Id., 58 U.S.L.W. at 4082; City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)(addressing First Amendment risks associated with unbridled licensing schemes; the difficulty of effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards by which to measure the licensor's action and prompt judicial review).

The District Court concluded that there was insufficient evidence in the legislative record for purposes of satisfying the requirements of O'Brien. APX. 110-130. The District Court found that very little, if any, evidence of the secondary effects of adult bookstores was

before the County Council at the time it enacted the adult book store law. It found that the "most concrete [of the] facts [in the legislative record] consist of general letters from citizens" and rejected the County's suggestions that generalized concerns unsupported by any specific factual or empirical evidence in the legislative record were a sufficient, constitutional predicate for the zoning ordinances in question.[10] APX. 125-128. The District Court, relying on Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 98 (6th Cir. 1981) and Basiardanes v. City of Galveston, 682

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[10] Many of the letters objected to the distribution of any sexually oriented materials, and the County Planning Board opposed CB 156-1975, the county's first adult book store ordinance, on the basis that there was no difference in land use from one type of bookstore to another.

F.2d 1203, 1215 (5th Cir. 1982), concluded that "post-hoc rationalizations--materials apparently collected for use in this case and not presented to the [County] Council before it enacted the challenged legislation" did not meet the standards of O'Brien and City of Renton v. Playtime Theatres, Inc., 475 U.S 41 (1986). APX. 127-128. The Court of Appeals, however, disagreed:

> "[L]ittle more than general, nonscientific and conclusory statements about sexually oriented businesses and their negative secondary effects met the . . . burden of proof . . . [as] there are notorious and self-evident conditions attendant to the commercial exploitation of human sexuality which do not vary greatly among generally comparable communities within even so heterogeneous a country as our own. . . . [and] we are inclined to review the reasonableness of Prince George's County zoning ordinances not solely on the basis of the legislative record before it, but of what it reasonably foresaw in the light of a sufficiently

> reported national experience copiously documented in the public record. . . . [and] we must assume that a proper factor in this local legislative determination of governmental interests was what was demonstratively deemed generally experienced in similarly situated communities." APX. 36-40.

This view conflicts with the Fifth Circuit, which requires "evidence that the state interest has a basis in fact and that the factual basis was considered . . . in passing the ordinance." Basiardanes, at 1215. It conflicts with the Sixth Circuit's rejection of a municipality's "post hoc justifications" in face of an otherwise barren legislative record to support its enactment of an adult movie theatre ordinance. The Eighth Circuit likewise requires some empirical basis for the enactment. Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 661 (8th Cir.

1981)(en banc). The Fourth Circuit's view conflicts with this Court's decision in Renton, which did not-as the Fourth Circuit suggests-dispense with the requirement of specific evidence in the legislative record and heightened scrutiny analysis.

The Court of Appeals did not analyze under O'Brien that the revocation by ordinance CB 116-1980 of the "grandfather" status previously afforded to adult book stores existing prior to the enactment of CB 156-1975 and that the stated purpose of CB 116-1980 was the "amortization of non-confirming adult book stores." The Court of Appeals, in reversing the District Court, did not analyze under O'Brien whether the special exception process serves a significant state interest and is narrowly drawn so as to render any incidental restriction upon First Amendment

freedoms no greater than necessary.

On December 6, 1989, approximately two months after the Fourth Circuit decision in this case, the Maryland Court of Special Appeals decided Landover Books v. Prince George's County, Maryland, 81 Md.App. 54, 566 A.2d 792 (1989). The Court of Special Appeals considered the same Prince George's County adult book store law and decided the same issues as in this case. The Court of Special Appeals specifically rejected the District Court's analysis in this case and agreed with the Fourth Circuit's that the law comported with the requirements of O'Brien. It held, therefore, that there was sufficient evidence of secondary effects in the record to justify the enactment of the zoning law under the First Amendment. The Maryland Court of Special Appeals, however, differed

with the Fourth Circuit concerning the special exception criteria. It concluded that the special exception criteria in Prince George's County Code § 27-317 constituted an unconstitutional, prior restraint on free speech, investing an improper degree of discretion in the local zoning officials. The Court of Special Appeals specifically rejected the analysis of the Fourth Circuit in this case and agreed with the District Court.

CONCLUSION

The Petition should be granted to resolve conflicts between the decision of the Court of Appeals in this case and those of the other Circuits and the Court of Special Appeals of Maryland, as well as the apparent conflict with applicable decisions of this Court. A decision by this Court

will resolve the uncertainty that now exists by virtue of conflicting rulings on important questions of federal law that are matters of public interest and importance.

Respectfully Submitted,

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FOR PETITIONER

APPENDIX

UNITED STATES
COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 88-2823

11126 BALTIMORE BLVD,t/a Warwick Books

Plaintiff-Appellee

vs.

PRINCE GEORGE'S COUNTY, MARYLAND

Defendant-Appellant

and

CARY W. GREENE; PAUL F. MALONE

Defendants

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, Senior District Judge. (CA-86-1411-K)

Argued: October 31, 1988
Decided: September 28, 1989

Before WIDENER, MURNAGHAN, and CHAPMAN, Circuit Judges.

Steven M. Gilbert, Associate County Attorney (Michael P. Whalen, County Attorney, Michael O. Connaughton, Deputy COunty Attorney, on brief) for Appellant. Howard J. Schulman for Appellee.

CHAPMAN, Circuit Judge:

The defendant/appellant, Prince George's County, Maryland (hereinafter "County"), appeals from a summary judgment order of the United States District Court for the District of Maryland declaring the County's adult bookstore zoning regulations as applied to the plaintiff/appellee, 11126 Baltimore Boulevard, Inc., t/a Warwick Books (hereinafter "Plaintiff"), unconstitutional. We reverse.

I.

In November 1975, the County Council, sitting as the District Council, approved an adult bookstore zoning ordinance. CB156-1975. This enactment limited the location of adult bookstores to specified commercial zones, required a "special exception" permit to operate an

adult bookstore, prohibited such stores from locating within 1,000 feet of any school building or 500 feet of any church, and required that "existing adult bookstores be modified in order to lessen their impact on the community." CB156-1975. "Adult Book Store" was defined in the provision as:

> Any commercial establishment that has twenty five percent (25%) or more of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations which depict sadomasochistic abuse, sexual conductor sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

CB-156-1975, Section 1.

The ordinance amended existing zoning provisions to require such establishments to blacken or otherwise

arrange all windows, doors and other apertures so as to prevent the viewing of the interior of the business establishment from without, to limit outdoor displays or advertising to one business sign, and to grant access only to persons above the age of 18 years. These provisions, according to legislative findings in the text of the bill, were added "[i]n order to prevent the impairment of, or detriment to, neighboring properties, including existing or potential land uses in the neighborhood and in order to protect children who may be attracted to such establishments." CB-1561975, Section 6.

The zoning ordinance was amended twice in 1976. CB-101976; CB-104-1976. One amendment increased from 500 feet to 1,000 feet the distance adult bookstores

must be placed away from places of worship. CB-10-1976.

In November 1980, the County modified the zoning ordinance to encourage "amortization of nonconforming adult book stores." CB-116-1980. These amendments redefined adult book stores by reducing the amount of non-adult stock from 25 percent to 5 percent and provided for the regulation of any store with one or more mechanical viewing devices. It also provided that nonconforming adult bookstores could continue in operation until July 1, 1985. After that date, an adult bookstore could only continue in operation if it received special exception approval. In order to obtain special exception approval, the applicant must demonstrate that the proposed use meets all of the requirements of the

ordinance by substantial evidence and that there is no substantial evidence to the contrary.[1]

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[1] The Zoning Ordinance of Prince George's County is Subtitle 27 of Prince George's County Code. The adult bookstore provisions at issue in this case were added to the ordinance by County Council Bills 156-1975, 10-1976, 104-1976 and 116-1980. Since the enactment of Council Bill 116-1980, the Zoning Ordinance was repealed and reenacted in recodified form. The current version of the adult bookstore provisions reads as follows:

SECTION 27-107.1(a)(6)

Adult Book Store: Any commercial establishment, which does not otherwise qualify as a theater or nonprofit free-lending library, that either:

(A) Has five percent (5%) or more of its stock on the premises, or has five percent (5%) or more of its stock on display, in books, periodicals, photographs, drawings, sculpture, motion pictures, films, or other visual representations which depict sadomasochistic abuse, sexual conduct, or sexual excitement, as defined by Article 27, Section 416A of the Annotated Code of Maryland; or

(B) Has on the premises one (1) or more mechanical devices for viewing such

materials.

SECTION 27-248

(a) In order for a certified nonconforming adult book store to continue, the requirements of this Section shall be met (in addition to any other applicable requirements of this Division).

(b) The purposes of this Section are:

(1) To protect children, who may be attracted to these establishments; and

(2) To prevent or control detrimental effects upon neighboring properties, and existing and proposed land uses in the general area.

(c) All certified nonconforming adult book stores shall meet the following requirements.

(1) All windows, doors, and other apertures shall be blackened or obstructed so as to prevent anyone outside the establishment from viewing its interior;

(2) Advertising shall be limited to one (1) business sign, as provided for in Section 27-615;

(3) The proprietor, owner, or personnel of the establishment shall prohibit access to the premises by any person who is under eighteen (18) years old.

(d) In order to provide for a reasonable standard of amortization and to prevent an unreasonable loss, all certified nonconforming adult book stores may continue in operation until July 1, 1985, in accordance with the provisions of this Subtitle. On or after that date, an adult book store may only continue in operation if a Special Exception for an adult book store is approved in accordance with Part 4 of this Subtitle.

SECTION 27-317

(a) A Special Exception may be approved if:

(1) The proposed use and site plan are in harmony with the purpose of this Subtitle [27];

(2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle [27];

(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;

(4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area; and

(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood.

SECTION 27-331

(a) An adult book store may be permitted [by special exception in certain zones], subject to the following:

(1) The subject structure shall be located at least one thousand (1,000) feet from any Residential Zone, land proposed to be used for residential purposes on an approved Basic Plan for a Comprehensive Design Zone, approved Official Plan for an R-P-C Zone, or any approved Conceptual or Detailed Site Plan, or property associated with any of the following: school, library, park, playground, recreational facility, church, convent, or monastery.

(2) As a part of the Special Exception approval, the Council may restrict advertisement, outdoor display, and the location of merchandise, and may impose other reasonable requirements deemed necessary to safeguard the health, safety, morals, and general welfare of the community.

(3) The proprietor, owner, or personnel of the establishment shall prohibit access to the premises by any person who is under eighteen (18) years old.

Briefly, a special exception application begins with a review for compliance with zoning ordinances by the Technical Staff in the Zoning Division of the Planning Commission which issues a "Technical Staff Report" recommending approval, conditional approval or denial of the application. The application may be passed on to the County Planning Board and then reviewed in a public hearing before a zoning Hearing Examiner. A Hearing Examiner's written decision may be appealed to Prince George's County Council, sitting as the District Council. The Council entertains oral argument and reviews the administrative record before making a final decision. The Council's final decision may be appealed to the Circuit Court for Prince George's County.

The Plaintiff was initially issued

a use and occupancy permit in June 1975. Following the enactment of the zoning ordinance in late 1975, the County requested the Plaintiff to apply for certification as a nonconforming use or reduce its stock in adult material to less than 25 percent. The Plaintiff reduced its adult-oriented stock in compliance with the request. After the 1980 ordinance was enacted, the County again instructed the Plaintiff to apply for special exception or seek certification as a nonconforming use. Plaintiff opted to apply for certification as a nonconforming use, and the use of an occupancy permit was extended to the Plaintiff. Pursuant to the 1980 provisions, a store operating under a nonconforming use could remain open until July 1985. CB-116-1980.

Plaintiff declined to make application for a special exception. Shortly after the July 1985 deadline passed, the County issued a citation to the Plaintiff for operating without a special exception, and the Board of Zoning Appeals ordered the Plaintiff to cease operation as a adult bookstore.

The Board of Zoning order was appealed to the Circuit Court for Prince George's County by the Plaintiff. In February 1986, the Plaintiff's landlord filed suit to evict the Plaintiff from the premises because the landlord also had received notice of the zoning violation in question. Prince George's County also filed suit against the Plaintiff and the landlord in the District Court of Maryland for Prince George's County to enforce the order of

the Board of Zoning Appeals. All three state court proceedings have been stayed by agreement of the parties and the Maryland courts pending a resolution of the present action commenced in the United States District Court on May 5, 1986.

This action brought by the Plaintiff requested the court to declare the county's adult bookstore zoning ordinance to be in violation of the First and Fourteenth Amendments to the United States Constitution and requested an injunction against its application. On summary judgment, the district court held the regulations unconstitutional on their face and the special exception standards and zoning ordinances invalid as applied to adult bookstores. The court concluded that in order to survive a First

Amendment challenge, a legislative body's assertion of a "substantial interest" in regulating adult bookstores must be supported by "substantial evidence" in the legislative record, which the court found to be lacking in the case at bar. Thus the court held the County's regulations invalid on their face. The County's special exception standards, the court further held, were invalid under the First Amendment because they "are quite vague" and "subject to possible manipulation and arbitrary application." 11126 Baltimore Boulevard, Inc. v. Prince George's County of Maryland, 684 F. Supp. 884, 898-99 (D.Md. 1988).

Attached to the County's motion for summary judgment were affidavits, legislative records, journal articles, academic studies and expert opinion

testimony suggesting that adult bookstores create undesirable secondary effects in their neighborhoods. The district court noted that the zoning provisions were not intended to eliminate adult bookstores but were content-neutral time, place and manner regulations of protected expression. As previously noted, the court held that to withstand a First Amendment challenge an ordinance regulating adult bookstores must be supported by substantial evidence in the legislative record. The district court found that specific evidence of the secondary effects of adult bookstores, which the Council alleged motivated its regulations, was not before the Council at the time it enacted the challenged legislation. Thus, the County failed to produce a legislative record with

substantial evidence justifying, for constitutional purposes, its zoning regulations.

II.

The Plaintiff's central claim is that the challenged ordinances violate its First Amendment rights. It is uncontested that Plaintiff, in operating its bookstore, is afforded substantial protection by the First and Fourteenth Amendments to the United States Constitution. See Bantam Books v. Sullivan, 372 U.S. 58 (1963). When regulations, such as those challenged here, impinge on a protected business, they must be subjected to the analysis set forth by the Supreme Court in Young v. American Mini Theatres, 427 U.S. 50 (1975), and more recently in City of Renton v. Playtime Theatres, 475 U.S. 41

(1986).

In American Mini Theatres, supra. the Court upheld an "Anti-Skid Row Ordinance" which provided, inter alia, that an adult theater could not be located within 1,000 feet of any two other "regulated uses," or within 500 feet of a residential area. "Regulated uses" included sexually oriented bookstores and theaters, cabarets, bars, dance halls and hotels restricted to an adult clientele. A plurality opinion authored by Justice Stevens reasoned that the lines drawn by the ordinance were justified by the City's legitimate interest in preventing urban blight and crime. Arguing that ultimately what was at stake was "nothing more than a limitation on the place where adult films may be exhibited," American Mini

Theatres, 427 U.S. at 71, it held that the ordinance did not violate the First and Fourteenth Amendments.

In Renton, supra, the Court reviewed a theater owner's challenge to a city zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school. The district court found that the ordinance did not substantially restrict First Amendment interests. The Court of Appeals for the Ninth Circuit reversed and remanded for a determination as to whether the City had substantial governmental interests to support the ordinance. The Supreme Court reversed the Ninth Circuit, holding that the ordinance was a valid time, place and

manner restriction enacted in response to "serious problems" created by sexually oriented picture theaters, rather than a restriction on the content of speech. Drawing extensively from its prior decision in American Mini Theatres, the Court said "'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." Renton, 475 U.S. at 47. Applying these standards, the Court held that the ordinance was content-neutral and, by its terms, was designed to fulfill the City's substantial interest in protecting the community and the quality of its urban life.

A.

As the trial court correctly observed, the "threshold inquiry in a First Amendment case involving a zoning ordinance is whether the legislation at issue is a content-based restriction, or a content-neutral time, place and manner restriction." 11126 Baltimore Boulevard, 684 F. Supp. at 890.

American Mini Theatres and Renton recognize that a community may regulate the effects of sexually oriented businesses without engaging in content-based regulation. More importantly, the Court has found no reason to apply rigorous content-based analysis where a community's "predominant concern" is to control the deleterious "secondary effects" of a particular kind of business rather than to suppress a certain type of speech. Renton, 475 U.S. at 49.

Additionally, the Court has noted that sexually explicit forms of expression merit less First Amendment protection than other kinds of speech. See American Mini Theatres, 427 U.S. at 70 (plurality opinion); Renton, 475 U.S. at 49 n.2.

The Renton Court defined "content-neutral" speech regulations as those that "are justified without reference to the content of the regulated speech." Renton, 475 U.S. at 48 (emphasis in the original), quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976). Since the Court found the ordinance in Renton, by its terms, designed to address the secondary negative effects of "adult motion picture theaters" rather than to suppress the expression of unfavorable or

controversial views, the challenged zoning ordinance was held to be a valid "content-neutral" regulation.

Pursuant to these criteria, we affirm the finding of the district court that the "ordinance in this case is a content neutral time, place and manner regulation." 11126 Baltimore Boulevard, 684 F. Supp. at 891. The County ordinances at issue are content-neutral because, as the challenged legislations' preambles and various sections declare,[2]

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[2] Council Bill 156-1975, Section 6, outlines the following purposes for the Zoning Ordinance:

> In order to prevent the impairment of, or detriment to, neighboring properties, including existing or potential land uses in the neighborhood, and in order to protect children who may be attracted to such establishments, the continuation of a legal, nonconforming adult book store shall only be permitted if the following requirements are met: . . .

they are designed to combat urban blight and protect minors valid interests unrelated to the suppression of particular speech. The district court reported that the "record does not suggest any intent by members of the Council or others to do more than restrict the areas in the County in which adult bookstores could locate." 11126 Baltimore Boulevard, 684 F. Supp. at 891. As Justice Powell observed in American Mini Theatres, "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." American Mini Theatres, 427 U.S. at 82 n.4 (Powell, J.,

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See also CB-116-1980, Section 1.

concurring).

B.

The challenged regulations are properly reviewed under the time, place and manner analysis because they do not regulate speech-related activities on the basis of content, but instead restrict primarily noncommunicative aspects of Plaintiff's right to own and operate a bookstore. Describing the regulations as time, place and manner regulations, of course, does not end our inquiry.

Regardless of the ordinances' focus on the secondary effects of sexually oriented businesses, there is little question that the regulations have an incidental impact on speech-related activities that are, in some measure, protected by the First Amendment. Because of this impact, we believe it

appropriate to analyze the ordinances under the four-part test of United States v. O'Brien, 391 U.S. 367, 377 (1968). See also American Mini Theatres, 427 U.S. at 79-80 (Powell, concurring); Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1169 (4th Cir. 1986); Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821, 826 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980). Under the O'Brien test, a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the

incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, 391 U.S. at 377. In Renton, the Court similarly stated that the "appropriate inquiry" in time, place and manner cases is "whether the . . . ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." Renton, 475 U.S. at 50. See also Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981).

We believe the challenged

ordinances satisfy the O'Brien test. Analysis starts with a recognition of the broad power of municipalities to implement land use controls to meet the increasing encroachment of urbanization on the quality of life. See generally Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Agins v. City of Tiburon, 447 U.S. 255 (1980); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The ordinances in this case, like the regulation in American Mini Theatres, is "certainly within the concept of the public welfare that defines the limits of the police power." American Mini Theatres, 427 U.S. at 75 (Powell, J., concurring). Such restrictions on the use of real property rests upon and are justified as a proper exercise of the police power to advance the public

health, safety and welfare. See Berman v. Parker, 348 U.S. 26, 32-33 (1954). Because zoning ordinances are legislative acts they enjoy a strong presumption of constitutionality, and if there is a reasonable relation between the end sought to be achieved and the means employed to achieve that end, the regulation will usually be upheld. We find, as did the district court, that the zoning regulations at issue in this case reflect a legitimate exercise of police power under which the state may limit the use of private property for the public welfare. 11126 Baltimore Boulevard, 684 F. Supp. at 893.

The next question is whether the regulations further an important or substantial governmental interest. We conclude that they do. The ordinances on

their face advance two governmental interests: first, to protect minors from exposure to sexually explicit materials and, second, to prevent the adverse effects of sexually oriented businesses on neighboring property values and land uses.[3]

As a majority of the Supreme Court recognized in American Mini Theatres, a community's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." American Mini Theatres, 427 U.S. at 71 (plurality opinion); see id. at 80 (Powell, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial."). See also Renton, 475

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[3] See footnote 2 above.

U.S. at 50; Wall Distributors, 782 F.2d at 1169 ("City advances government interests of reducing crime and maintaining public health and decency standards"); Hart Book Stores, 612 F.2d at 828 (state "has a substantial interest in maintaining a stable, healthful environment in its cities"); FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1303 (5th Cir. 1988) (City has substantial interest in maintaining quality of urban life). There can also be no question that governments have a legitimate interest in shielding minors from sexually explicit materials which are not considered obscene as to adults. See Ginsburg v. New York, 390 U.S. 629, 639-40 (1968) (state's "interest in the well-being of its youth" justifies some limitation on First Amendment).

We find that the County's stated interests are substantial. We must also review, however, whether the ordinances had sufficient legislative basis, or whether the County Council when enacting the regulations had "evidence [which it] reasonably believed to be relevant to the problem[s]" of preserving the neighborhood and protecting children. Renton, 475 U.S. at 51-52. The district court found the ordinances unconstitutional since there was insufficient evidence in the record to substantiate the finding that the regulated "speech" produces negative secondary effects. 11126 Baltimore Boulevard, 684 F. Supp. at 893. We disagree.

The Ninth Circuit ruled in Renton that because the challenged ordinance was

enacted without benefit of studies specifically relating to "the particular problems or needs of Renton" and the City's justifications for the ordinance were "conclusory and speculative," the regulations, thus, were invalid. Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 537 (9th Cir. 1984). The district court in the case sub judice similarly struck down zoning ordinances because County Council did not have before it at the time it took action on the challenged ordinances "substantial evidence" which provided a factual basis for the Council's conclusion that the regulated businesses actually produced negative secondary effects and the restrictions would advance the stated governmental interests. Reversing the Court of Appeals in Renton, the Supreme

Court opined that the Ninth Circuit "imposed on the city an unnecessarily rigid burden of proof." Renton, 475 U.S. at 50. We believe the same is true of the trial court in the case at bar. As the Supreme Court counseled in Renton, "[t]he First Amendment does not require a city, before enacting such an [adult theater zoning] ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." Renton, 475 U.S. at 51-52 (emphasis added).

In Renton, the City apparently relied on the experience of, and studies prepared by, the City of Seattle when it enacted its own zoning ordinance. This

was found by the Court to be a sufficient legislative record -- one which the city "reasonably believed to be relevant to the problem that the city addresses." Id. Upon close examination, as the Circuit Court observed, it is apparent that the "record presented by Renton to support its asserted interest in enacting the zoning ordinance is very thin." Playtime Theaters, 748 F.2d at 536. [4]

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[4] Justice Brennan, in dissent, elaborated on the paucity of evidence before the City at the time the challenged action was taken:

> The amended ordinance states that its "findings" summarize testimony received by the City Council at certain public hearings. While none of this testimony was ever recorded or preserved, a city official reported that residents had objected to having adult movie theaters located in their community. However, the official was unable to recount any testimony as to how adult movie theaters would specifically affect the schools, churches, parks, or residences "protected" by the

Despite strenuous protest that the

> ordinance . . .. The City Council conducted no studies, and heard no expert testimony, on how the protected uses would be affected by the presence of an adult movie theater, and never considered whether residents' concerns could be met by "restrictions that are less intrusive on protected forms of expression." Schad [v. Borough of Mount Ephraim, 452 U.S. 61, 74 (1981)]. As a result, any "findings" regarding "secondary effects" caused by adult movie theaters, or the need to adopt specific locational requirements to combat such effects, were not "findings" at all, but purely speculative conclusions.
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> [E]ven assuming that Renton was concerned with the same problems as Seattle and Detroit, it never actually reviewed any of the studies conducted by those cities. Renton had no basis for determining if any of the "findings" made by these cities were relevant to Renton's problems or needs. Moreover, since Renton ultimately adopted zoning regulations different from either Detroit or Seattle, these "studies" provide no basis for assessing the effectiveness of the particular restrictions adopted under the ordinance.

Renton, 475 U.S. at 60-61 (Brennan, J., dissenting) (footnotes omitted).

evidence before the City did not specifically address Renton's problems and was insufficient to justify the burdens that the ordinance imposed upon constitutionally protected expression, the majority found the legislative record substantial enough to support the ordinance. In short, little more than general, nonscientific and conclusory statements about sexually oriented businesses and their negative secondary effects met the City's burden of proof. See also International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520, 1527 (11th Cir. 1986) (court indicated City could rely on the experiences of other communities and that challenged ordinances should be tested as zoning controls with reference to the entire city zoning scheme); Genusa v.

City of Peoria, 619 F.2d 1203, 1211 (7th Cir. 1980) ("city need not await deterioration in order to act" and that its "legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action").

Indeed, it would appear that there was less evidence before the City of Renton when its ordinance was enacted than in the record developed by Prince George's County when it enacted and amended the challenged ordinances. Evidence in the County record before enactment of CB-156-1975 contained statements expressing the views of citizens and government officials that adult bookstores adversely effect neighborhoods, may be detrimental to children, and should be made subject to

locational controls. Specifically, the record included correspondence from concerned citizens' associations, municipal council members, a youth club leader, a state's attorney, and others testifying to the negative secondary effects of sexually oriented businesses and the need to address such problems through zoning. This evidence was supplemented by extensive untranscribed testimony at widely advertised public meetings and hearings. Administrative bill files accompanying the subsequent ordinances and amendments are replete with similar material. We find this evidence on secondary effects sufficient under Renton to withstand a constitutional challenge to the ordinance.

Furthermore, in enacting

legislation of this sort, we find it reasonable for local legislative bodies to take notice or assume matters of common knowledge and experience. As countless cases addressed by this court and courts across the nation will confirm, there are notorious and self-evident conditions attendant to the commercial exploitation of human sexuality which do not vary greatly among generally comparable communities within even so heterogeneous a country as our own. Thus, we are inclined to review the reasonableness of Prince George's County zoning ordinances not solely on the basis of the legislative record before it, but of what it reasonably foresaw in the light of a sufficiently reported national experience copiously documented in the public record. It defies common sense to

suppose that community leaders in Prince George's County were not aware of comparable conditions in other localities and of the varied responses being attempted by other governments to similar conditions.[5] Consequently, we must assume that a proper factor in this local legislative determination of governmental interests was what was demonstratively deemed generally experienced in similarly situated communities. See Wall Distributors, 782 F.2d at 1169-70 n.7.

Our recognition of a local legislative body's exercise of

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[5] The language employed by Prince George's County in its zoning ordinances, which is substantially similar to that adopted by other communities across the country, confirms that County leaders took notice of, indeed sought to follow, other communities' efforts to address the problems attendant to sexually oriented businesses.

legislative notice is consistent with previous holdings of this Court. In Wall Distributors and Hart Book Stores we affirmed, on slim legislative records, police power statutes analogous to the ordinances in the present controversy. In Wall Distributors, we upheld a criminal statute which imposed licensing requirements upon and made criminal the operation of closed-booth movie arcades. From all that appears in Wall Distributors, at the time the regulations were enacted, the City Council had little more before it than expressions of concern by citizens and government officials. We rejected the plaintiff's assertion that the City did not have sufficient evidence of the activities and health conditions in closed-booth arcades to provide an adequate basis to support

the need for such regulations. Judge Phillips stated:

> Although [Plaintiff] assails the lack of evidence of the precise nature of activities and health conditions in the booths before adoption of the open booth regulation, a court in constitutional review need only conclude that the City has advanced sufficient government interests. The decision to enact such a regulation constitutes a legislative determination that closed booth showings produce side effects that are destructive of public health, decency and order. To have this determination sustained against constitutional attack, a legislature is not bound to create an evidentiary record that would pass muster on plenary judicial review of legislation's necessity and fitness to achieve desired results. Judicial review goes only to whether the legislative determination of justification and fitness is not facially without factual support, hence not arbitrary and capricious . . .. [W]e conclude that the City here had a reasonable basis for determining that closed booth showings were sufficiently likely to foster a pattern of conduct inimical to public health, decency and order that in those interests they should be foreclosed.

Wall Distributors, 782 F.2d at 1169. [6]

Judge Phillips went further in affirming the reasonable exercise of legislative notice:

> In assessing the reasonableness of local legislative determinations of ends and means under this quite deferential standard of constitutional review, we may not confine the local legislature to only what it knows and can foresee from purely local conditions already experienced. Legislatures can no more be held bound not to know what the whole world knows than can courts; legislative notice of facts must be deemed to run at least as wide as does judicial notice.

Id. at 1169 n.7.

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[6] It is worth noting that the Supreme Court in Renton required only that evidence be "reasonably believed to be relevant to the problem . . . addressed," 475 U.S. at 51-52. We similarly required in Wall Distributors, 782 F.2d at 1169, decided shortly before Renton, only that the legislature have a "reasonable basis" for its action.

Similarly, in Hart Book Stores, a North Carolina statute required disbursion of sexually oriented businesses, like the ordinance in American Mini Theatres. The North Carolina legislature apparently had nothing more before it when it enacted the legislation than a county health officer's report which was read to a legislative committee by a sponsoring senator. Hart Book Stores, 612 F.2d at 828-29 n.9. Despite this sparse record, we held that

> The legislature could reasonably have determined that the development of the "total under one roof" approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood. While there is no formal legislative history of the law, the record does show that the sponsor of the legislation was concerned to bring these secondary effects to the legislature's attention.

Id. at 828 (footnote omitted). The Court further noted:

> In concluding that the rational relation between state interest and means of regulation required to support the classification was not present the district courts were also apparently greatly influenced by the dearth of hard evidence before the legislature that the interest was indeed threatened or that the means chosen to protect it would work. In this, we think they insisted on a showing that need not be made in order to uphold legislative efforts to deal with a problem within reach of the police power. In Mini Theatres itself, the fact that the legislative body had before it the testimony of a single expert concerning the effect of adult businesses on neighborhoods, Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. at 365, was not thought to draw in question the rationality of the legislative decision to attempt regulation in the particular way chosen. As the Supreme Court pointed out in Paris Adult Theatre I v. Slayton, 413 U.S. 49, 61, 93 S.Ct. 2628, 2637-2638, 37 L.Ed.2d 446 (1973): "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions," and "[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." Furthermore, in judicial assessments of the rationality

> of legislative means chosen to advance state interests, government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." Mini Theatres, 427 U.S. at 71, 96 S.Ct. at 2453. The very disparity of legislative approaches in various jurisdictions to regulating the kind of commercial enterprise involved here and the lack of a long record of regulatory efforts underscores the need for a chance for reasonable experimentation.

Id. at 832.

The district court further discounted as "post-hoc rationalizations" material collected by the County supporting the rationality of its zoning ordinances and added to the record after the regulations were approved. The supplemental material included the affidavit of a professional land-use planner and numerous studies regarding adult bookstore zoning regulations in various communities. Although the district court acknowledged

that this material would have indeed been sufficient to sustain the County's regulations had it been reviewed by the Council prior to enactment of the ordinances, 11126 Baltimore Boulevard, 684 F. Supp. at 896, the court obviously declined to consider this evidence which was submitted in preparation for the present litigation. A cursory review of the case law reveals that courts have routinely admitted evidence at trial to supplement a legislative record or explain the stated interests behind challenged regulations. It would appear from reviewing the Renton case, for example, that testimony of this nature was admitted at trial and considered on appeal. See also 15192 Thirteen Mile Road, Inc. v. City of Warren, 626 F. Supp. 803, 818 (E.D. Mich. 1985) (trial

testimony "clearly demonstrates that adult uses are a source of urban blight").

Clearly, trial testimony and "supplemental" materials cannot sustain regulations where there is no evidence in the pre-enactment legislative record. But such is not the case here. As previously noted, the administrative bill files for the 1975 ordinance and subsequent enactments were replete with thoughtful statements from informed, concerned citizens and government officials spelling out the problems posed by adult businesses and ways of addressing these problems.

We thus hold that the County's legislative records show substantial and legitimate legislative interests which the County reasonably believed to be

relevant to the problem it sought to address. We find no principle derived from Renton, American Mini Theatres, or decisions of this Court which will sustain the unnecessarily rigid burden of proof imposed by the district court, a rule which the Renton ordinance itself would have failed to meet. The evidence before the County Council appears more substantial than that held sufficient in Renton, only slightly less substantial than that in American Mini Theatres, and significantly more substantial than that approved in Wall Distributors and Hart Book Stores. In the light of this record, coupled with the reasonable exercise of legislative notice and supplemental evidence presented to the trial court, we hold that the County sufficiently demonstrated substantial

governmental interests in its regulations.

The third element of the O'Brien test concerns whether the County's interest is one unrelated to the suppression of free expression. The relevant question here, as we observed in Hart Book Stores, is not whether the perceived "legislative motive" for legislation is unrelated to the suppression of free expression, but whether an identifiable "governmental interest" is so unrelated. Hart Book Stores, 612 F.2d at 829. Indeed, the O'Brien Court disavowed any inquiry into legislative motive: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." O'Brien, 391 U.S. at 383. As the Court

further counseled, in conducting this inquiry one must eschew altogether the "guesswork" of speculating about the motives of lawmakers, since legislators may have multiple, unexpressed purposes for enacting legislation. Id. at 384. Rather, we must look to the face of the regulation and the identifiable interests advanced to justify the regulation. On its face and under the interests advanced by the County, the challenged ordinances are designed to protect children and preserve neighboring property values and land uses. The district court correctly noted that the availability of alternative sites within the County for adult book stores supports the conclusion that suppression of speech-related activities was not behind the County

ordinances.[7] 11126 Baltimore Boulevard,

[7] An affidavit submitted to the district court by Dale C. Hutchison, Chief of the Zoning Division of the Maryland National Capital Park and Planning Commission, indicates that there are substantial areas within the County where adult bookstores could be located. According to Mr. Hutchison, adult bookstores, like virtually all commercial land uses and all industrial land uses, are prohibited in residential zones. Over 90 percent of the land area in Prince George's County is residentially zoned. About 47 percent of the County is rural in character and another 28 percent is in half-acre "Rural Residential" zoning. Also, a substantial portion of the non-rural area of the County is in public ownership. Pursuant to the locational restrictions as stated in the zoning ordinances, #r. Hutchison estimated that there are about 20 different commercial or industrial areas of the County with sufficiently commercially- and industrially-zoned land to allow sites within each area to meet the 1,000-foot setback requirement. These 20 areas are distributed throughout the County, but most are located in more populated areas. The total land area of all available sites for adult bookstores is roughly 1,400 acres. That area is about 6 percent of the 22,500 acres of land in Prince George's County zoned for commercial and industrial uses.

Prince George's County's ordinances, we believe, reserve ample alternative sites

684 F. Supp. at 896. This also comports with the emphasis the Renton Court placed on the necessity of providing alternative avenues and fora of communication. Renton, 475 U.S. at 53. We decline to look past the facially apparent effect of the regulation and the interest-based purpose advanced by the County for its enactments.

The final factor of the O'Brien test requires that the incidental restriction on First Amendment interests be no greater than is essential to achieve the interests advanced by the government.

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for the establishment of adult bookstores. The Renton Court held that "the First Amendment requires only that [the City] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city." Renton, 475 U.S. at 54. The ordinances before us today certainly meet this requirement.

The County's locational zoning regulations, as the district court noted, are not significantly different from those challenged in Renton and American Mini Theatres. "Confining adult bookstores to certain specific commercial and industrial zones may well promote the protection of residential areas and children, as may the 1,000-foot restriction and the sign and window-blackening requirements." 11126 Baltimore Boulevard, 684 F. Supp. at 89697. See generally Dumas v. City of Dallas, 648 F. Supp. 1061, 1070 (N.D. Tex. 1986), aff'd. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988). Once again, the availability of alternate sites within the County to locate adult bookstores in conformity with the ordinances confirms that the County took care not to zone

such businesses out of existence. We conclude that the regulations are both narrowly tailored to serve the interests advanced by the County and they afford ample alternative avenues of communication and, therefore, satisfy this element of the test.

Accordingly, pursuant to the four-part O'Brien analysis, we find the challenged zoning ordinances sufficiently justified, despite their incidental impact upon the Plaintiff's First Amendment rights.

C.

The district court further held that the criteria established by Prince George's County for issuance of a special exception were vague and "subject to possible manipulation and arbitrary application by officials who might object

to the contents of the materials sold at adult bookstores." 11126 Baltimore Boulevard, 684 F. Supp. at 899. Therefore, the court concluded that the special exception standards, as applied, constitute an unconstitutional prior restraint. Id. We disagree.

Pursuant to Prince George's County Code § 27-317, an applicant for a special exception to operate an adult bookstore must show that the proposed use will be in harmony with the zoning plan and not substantially impair the integrity of the County's Master Plan for community development or adversely affect the health, safety or welfare of residents in the area or be detrimental to the use or development of adjacent properties or the general community. As a prerequisite for special exception approval, the section

requires that the proposed use be compatible with the stated interests of the County in enacting the ordinances.

Comprehensive, uncontroverted affidavits submitted by the Chief Zoning Hearing Examiner in Prince George's County, Barry S. Cramp, and the Chief of the Zoning Division of the Maryland National Capital Park and Planning Commission, Dale C. Hutchison, explained in detail the review process for zoning and special exception applications in Prince George's County. As for the general requirements, pursuant to § 27-317, a special exception applicant must demonstrate that the proposed use will not harm adjacent properties or the neighborhood by creating undue noise, conditions of blight, traffic congestion, unsafe conditions or similar problems.

The general requirements of § 27-317 are satisfied by witnesses for the applicant explaining the proposed use and addressing specifically any problems, such as traffic, which are apparent from the application, the Technical Staff Report, or other evidence in the record. As for the specific requirements of § 27-331, the most significant requirement is that a proposed bookstore must be located at least 1,000 feet from any "Residential Zone" or any "school, library, park, playground, recreational facility, church, convent, or monastery." Satisfaction of this requirement is met by objective criteria. The zoning ordinance allows a special exception applicant to obtain a variance from most dimensional requirements on a showing of practical difficulty or hardship and

special conditions attendant to a particular property. As part of special exception approval, the Council may also restrict outdoor displays and advertisements and similar features to ensure that they comport with the general legitimate objectives of the ordinances. Finally, a special exception may not be denied to an applicant if he meets the ordinance requirements by substantial evidence and there is no substantial evidence to the contrary. Under such standards, the District Council has virtually no discretion to deny a special exception application, and it is bound by law, as announced by the Maryland courts, to approve the exception.

It is settled that any license or special exception requirement for a speech-related activity must contain

narrow and definite standards to guide the authority granting approval. See Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). We are persuaded by the language of the challenged ordinances, the evidence in the record, and Maryland case law that the special exception requirements adopted by Prince George's County do not confer unbridled discretion upon County Council and zoning administrators. The provisions under attack provide definite guidelines, consistent with the substantial and legitimate interests advanced by the County, which zoning officials must apply when determining whether to grant a conditional use or special exception permit. The special exception application may not be denied if the applicant meets the specified

ordinance requirements by substantial evidence and there is no substantial evidence to the contrary. Thus, County officials are without boundless discretion in approving or rejecting special exception applications.

The special exception provision in the challenged ordinances is not unlike similar ordinances common in Maryland. Under Maryland case law a county's decision pertaining to a special exception application is to be supported by competent material and substantial evidence in the record. Prince George's County v. Meininger, 264 Md. 148, 285 A.2d 649 (1972); Entzian v. Prince George's County, 32 Md. App. 256, 360 A.2d 6 (1976). Such a standard, well understood by Maryland courts and zoning administrators, acts as a clear check on

the manipulation and arbitrary application of the terms of a special exception provision. Moreover, special exception decisions are subject to review in the Maryland courts.

All decisions pertaining to a special exception application are subject to timely administrative and judicial review. As revealed by the affidavits submitted by Cramp and Hutchison, such decisions go through a multi-tiered administrative review process including public hearings and an appearance before an examiner who must file a written decision supported by findings of fact (based on evidence in the administrative record) and conclusions of law. If the examiner's recommendation is rejected by the District Council -- the legislative body making final decisions in zoning

cases -- the Council must make and adopt its own findings and conclusions. The rules and guidelines of the administrative review process include time limits although not written into the challenged adult bookstore ordinances which are to be followed by reviewers. [8]

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8 Every step of the administrative review process is not bound by precise time limits. Special exception procedures, including some specified time limits, are outlined in Prince George's County Code # 27-490 et seq. The affidavits submitted by Cramp and Hutchison, two officials extensively involved in the special exception process, estimate that the special exception process normally takes about six months. Hutchison further stated that adult bookstores are generally allowed to continue their operations while seeking extensions of time or special exception approval from zoning authorities. Plaintiff has failed to show, as the district court observed, "that the application process for adult bookstores has generally taken longer than six months, or that adult bookstore applicants have been treated in a manner different from other classes of special exception applicants, or that six months or one year is an unreasonable time for processing an application. 11126 Baltimore Boulevard, 684

Plaintiff complains that the risk of delay in the administrative review process is in itself sufficient to render the special exception unconstitutional. We disagree. The diligent exercise of due process takes time, and we find the time limits generally followed by the County to be reasonable for careful review in this sensitive area of the law. The District Council's final decision in any special exception case may be appealed to the Circuit Court for Prince George's County.

As previously stated, Maryland case law also provides safeguards relative to special exception provisions such as

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F.Supp. at 899 n.31. Therefore, we concur with the district court that in this case the length of the process in and of itself does not constitute a "prior restraint." Id.

those in the challenged ordinances. The Court of Appeals in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981), stated:

> This Court has frequently expressed the applicable standards for judicial review of the grant or denial of a special exception use. The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan . . . . [I]f there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

Schultz, 291 Md. at _____, 432 A.2d at 1325 (emphasis in the original). The Court further held:

> [T]he appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

Schultz, 291 Md. at _____, 432 A.2d at 1331.

More recently and directly on point, in 5297 Pulaski Highway v. Town of Perryville, 69 Md. App. 590, 519 A.2d 206, cert. denied, 309 Md. 521 (1987), the Court of Special Appeals of Maryland upheld a zoning ordinance regulating sexually oriented businesses with

distance and permit requirements. The Court rejected a First Amendment challenge to a conditional use provision. although the Perryville ordinance included 13 separate criteria to guide the administrating officials, we do not find them significantly more precise than the County standards in the case at bar. (Section 27-317, one recalls, expressly incorporates the purposes and interests of the entire Subtitle.) The Perryville standards are indeed textually more detailed than those of Prince George's County; however, the former standards, according to the ordinance, are merely "a further guide" to the Zoning Board to be considered "where appropriate." There is no indication that zoning officials are "bound" by each and every one of the 13 guidelines. Perryville confirms our

belief that special exception provisions, such as those in the case sub judice, have unambiguous meanings both for Maryland courts and zoning officials charged with enforcing the special exception application process.

We conclude, therefore, that Prince George's County's standards do not offend the First Amendment by granting zoning administrators and the District Council undue and arbitrary discretion to deny special exceptions for adult bookstores.

For the reasons stated herein, the judgment of the district court is

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2823

11126 Baltimore Boulevard,

Plaintiff - Appellee,

v.

Prince George's County,

Defendant - Appellant.

O R D E R

Upon consideration of appellee's motion to amend judgment,

IT IS ORDERED that the date of October 10, 1989, is substituted for that of September 28, 1989, as the date of filing the amended opinion in this case.

Entered at the direction of Judge Chapman, with the concurrence of Judge Widener and Judge Murnaghan.

For the Court

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2823

11126 BALTIMORE BOULEVARD,
t/a Warwick Books

Plaintiff - Appellee

v.

PRINCE GEORGE'S COUNTY, MARYLAND

Defendant - Appellant

and

CARY W. GREENE; PAUL F. MALONE

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Widener and Judge Murnaghan.

For the Court,

JOHN M. GREACEN
CLERK

[Filed October 25, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTICT OF MARYLAND

11126 BALTIMORE BOULEVARD,
INC., ETC.

V. CIVIL NO. K-86-1411

PRINCE GEORGE'S COUNTY
OF MARYLAND, ET AL.

O R D E R

(1) Judgment is hereby entered for plaintiff.

(2) Sections 27-107.1(a) (6), 27-248, and 27-331 of the Zoning Ordinance of Prince George's County are hereby declared unconstitutional as violative of the First Amendment.

(3) Section 27-317 of the Zoning Ordinance of Prince George's County is hereby declared unconstitutional as violative of the First Amendment as

applied to adult bookstores but only as applied to adult bookstores.

(4) The Clerk is directed to mail copies of this Order and of the opinion filed today in this case to counsel of record.

(5) It is so ORDERED this 15th day of April, 1988.

/s/
Frank A. Kaufman
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. K-86-1411

11126 BALTIMORE BOULEVARD, INC., ETC.

V.

PRINCE GEORGE'S COUNTY OF MARYLAND,
ET AL.

Filed: April 5, 1988

Howard J. Schulman, of Baltimore, Maryland, for Plaintiff.

Larnzell Martin, Jr., County Attorney, and Steven M. Gilbert, Associate County Attorney, for Prince George's County, of Upper Marlboro, Maryland, for Defendant Prince George's County of Maryland.

Monroe Jon Mizel, of Kensington, Maryland, for Defendants Gary Greene and Paul Malone t/a Deslico, a Joint Venture.

KAUFMAN, Senior District Judge.

Plaintiff, a Maryland corporation and the operator of an adult bookstore in a shopping mall in Prince George's County, Maryland ("County"), contends

that the County's zoning provisions regulating the location and operation of adult bookstores violate the First and Fifth Amendments.[1] Plaintiff brings this action pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief. After extensive briefing and two hearings, the parties have submitted the case to this Court to determine the facts without trial, on the basis of the record, and to apply the law to those

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1 Plaintiff also named its landlord, Deslico, A Joint Venture, and its principals, Gary Greene and Paul Malone, as defendants in this action. See Complaint ¶ 5. Deslico had instituted a state court proceeding to eject plaintiff from the premises because plaintiff's violation of the Zoning Ordinance allegedly constituted a breach of plaintiff's lease. However, plaintiff has sought no relief against these parties and has not pressed any claims against them in this case.

findings of fact.[2]

I. The Zoning Legislation

(Text continued on next page.)

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2 There are few, if any, factual disagreements between the parties. However, in certain instances, this Court has been asked to accept or reject certain factual conclusions asserted or denied by one or another party, which the undisputed underlying facts in the record permit to be inferred. To the extent this Court has considered it relevant and material to accept or reject any such proposed inference, such acceptance and/or rejection is identified in this opinion.

The Prince George's County Council[3] enacted zoning regulations governing adult bookstores in 1975, and modified those regulations in 1976 and 1980. The most recent changes became law in 1987, after this case was instituted by plaintiff.[4]

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3 In the State of Maryland zoning power is usually exercised by each of the counties and the State of Maryland. However, most of Prince George's County is within the zoning jurisdiction of the District Council for the Maryland-Washington Regional District, which also includes the District of Columbia and Montgomery County, Maryland. In zoning matters affecting property located in Prince George's County within the Maryland-Washington Regional District, the Prince George's County Council sits as the District Council.

4 The Zoning Ordinance of Prince George's County is Subtitle 27 of the Prince George's County Code. The adult bookstore provisions at issue in this case were added to the ordinance by County Council Bills 156-1975, 10-1976, 1041976, and 116-1980. References to the

Council Bill 156-1975, enacted on November 18, 1975, set forth the purpose of the adult bookstore legislation and established the standards to which such stores were required to conform. The preamble to the 1975 bill stated, in part, that its purpose was to "limit[] the location of adult bookstores" existing in 1975 or thereafter to certain commercial zones, to require a special exception before a bookstore could locate in those commercial areas specifically zone for adult bookstores, and to require "that [then] existing adult bookstores be modified in order to lessen their impact on the community."

Prince George's County Code are to the most recent recodification of Subtitle 27, involving minor word changes in the language contained in the original bills. See note 6 below.

The County's Zoning Ordinance generally provides that a special exception[5] (including an application for an adult bookstore) may be approved if:

> (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;
>
> (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
>
> (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or

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5 "A special exception is a use which has been legislatively predetermined to be conditionally compatible with the uses permitted as of right in a particular zone, the condition being that a zoning body must, in each case, decide under specified statutory standards whether the presumptive compatibility in fact exists." Creswell v. Baltimore Aviation Service, Inc., 257 Md. 712, 719 (1970). The County's special exception provisions apply to all uses which are not in conformance with the permitted uses in a given zone.

Functional Master Plan, the General Plan;

(4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area; and

(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood.

Section 27-317.

Prince George's County Code § 27-314 provides that the District Council may approve special exceptions, subject to the delegation of this authority to a Zoning Hearing Examiner. County Code § 27-312 provides, among other things, that the Zoning Hearing Examiner "shall have all the authority, discretion, and power given the District Council" with respect to the granting of special exceptions to the extent that there is not a specific provision to the contrary.

An adult bookstore is defined in Section 1 of the 1975 bill as:

> Any commercial establishment that has twenty-five percent (25%) or more of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations which depict sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

Section 7 of the bill also subjected adult bookstores to the following specific locational and operational conditions:

> (a) the structure in which such use is proposed shall be at least 1,000 feet from the nearest property line of any public, private, or parochial school, library, park, or playground, and at least 500 feet from the nearest property line of any church, convent, monastery, synagogue or other place of worship;
>
> (b) special conditions, such as, but not limited to, restrictions on advertisement, outdoor display, location of merchandise, and other

reasonable requirements deemed necessary to safeguard the health, safety, morals, and general welfare of the community may be imposed by the District Council as requisite to the grant of a special exception;

(c) Such use will not impair or prove detrimental to neighboring properties, existing or potential land uses in the general area, or the development of same.

Further, the bill provided, at Section 6:

In order to prevent the impairment of, or detriment to, neighboring properties, including existing or potential land uses in the neighborhood and in order to protect children who may be attracted to such establishments, the continuation of a legal, non-conforming adult book store shall only be permitted if the following requirements are met:

(a) All windows, doors and other apertures shall be blackened or otherwise obstructed so as to prevent the viewing of the interior of the establishment from without.

(b) Outdoor displays or advertising shall be limited to one (1) business sign as provided for in Section 25.61.

(c) The proprietor, owner and/or personnel of such establishment shall prohibit access to the premises by any person who

has not attained the age of eighteen (18) years.

The County Council, in Council Bill 10-1976, enacted on April 6, 1976, amended the locational restrictions as follows:

> The structure in which such use is proposed shall be at least one thousand (1,000) feet from the nearest property line of any land in any residential zone, or any public, private, or parochial school, library, park, [or] playground, or other recreational facility, whether commercial or nonprofit, in any other zone, and at least [500] 1,000 feet from the nearest property line of any church, convent, monastery, synagogue or [other] similar place of worship . . . .

(Underscoring indicates added language; brackets indicate deletions.)

On November 16, 1976, the County Council enacted additional changes in Council Bill 104-1976, providing, inter alia, for the continuation of preexisting nonconforming uses, including adult

bookstores predating November 18, 1975, as long as any such stores complied with the new locational and operational restrictions.

In 1980, changes were enacted by the District Council in Council Bill 116-1980, reducing to 5 percent from 25 percent the percentage of material depicting sadomasochistic abuse, sexual conduct or sexual excitement which a store could carry and still avoid classification as an adult bookstore. That 1980 change also added an amortization provision for nonconforming bookstores:

> In order to provide for a reasonable standard of amortization, and to prevent an unreasonable loss, all nonconforming adult bookstores may continue in operation until July 1, 1985, in accordance with the provisions of Subsection (a) of this Section. On or after that date, an adult book store may only continue in operation pursuant to a special

exception for an adult book store, approved in accordance with the provisions of Division 36 [provisions for granting of exceptions] of this Subtitle.

The zoning requirements were again altered in 1987 to require adult bookstores to prohibit access to minors. Section 27-331(a)(3).[6]

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6 Since the enactment of Council Bill 116-1980, the Zoning Ordinance was repealed and reenacted in recodified form. The present version of the adult bookstore provisions reads as follows:

SECTION 27-107.1(a)(6)

Adult Book Store: Any commercial establishment, which does not otherwise qualify as a theater or nonprofit free-lending library, that either:

(A) Has five percent (5%) or more of its stock on the premises, or has five percent (5%) or more of its stock on display, in books, periodicals, photographs, drawings, sculpture, motion pictures, films, or other visual representations which depict sadomasochistic abuse, sexual conduct, or sexual excitement, as defined by Article 27, Section 416A of the Annotated Code of Maryland; or

(B) Has on the premises one (1) or more mechanical devices for viewing such materials.

SECTION 27-248

(a) In order for a certified nonconforming adult book store to continue, the requirements of this Section shall be met (in addition to any other applicable requirements of this Division).

(b) The purposes of this Section are:

(1) To protect children, who may be attracted to these establishments; and

(2) To prevent or control detrimental effects upon neighboring properties, and existing and proposed land uses in the general area.

(c) All certified nonconforming adult book stores shall meet the following requirements:

(1) All windows, doors, and other apertures shall be blackened or obstructed so as to prevent anyone outside the establishment from viewing its interior;

(2) Advertising shall be limited to one (1) business sign, as

provided for in Section 27-615;

(3) The proprietor, owner, or personnel of the establishment shall prohibit access to the premises by any person who is under eighteen (18) years old.

(d) In order to provide for a reasonable standard of amortization and to prevent an unreasonable loss, all certified nonconforming adult book stores may continue in operation until July 1, 1985, in accordance with the provisions of this Subtitle. On or after that date, an adult book store may only continue in operation if a Special Exception for an adult book store is approved in accordance with Part 4 of this Subtitle.

SECTION 27-317

(a) A Special Exception may be approved if:

(1) The proposed use and site plan are in harmony with the purpose of this Subtitle [27];

(2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle [27];

(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in

the absence of a Master Plan or Functional Master Plan, the General Plan;

(4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area; and

(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood.

SECTION 27-331

(a) An adult book store may be permitted [by special exception in certain zones], subject to the following:

(1) The subject structure shall be located at least one thousand (1,000) feet from any Residential Zone, land proposed to be used for residential purposes on an approved Basic Plan for a Comprehensive Design Zone, approved Official Plan for an R-P-C Zone, or any approved Conceptual or D#tailed Site Plan, or property associated with any of the following: school, library, park, playground, recreational facility, church, convent, or monastery.

(2) As a part of the Special Exception approval, the Council may restrict advertisement, outdoor display, and the location of

II. Background

Plaintiff's bookstore, located at 11126 Baltimore Boulevard in Prince George's County, began operations in June, 1975, pursuant to a County use and occupancy permit. After the effective date of the County's first adult bookstore zoning regulations, enacted on November 18, 1975 as Council Bill 156-1975, the County requested plaintiff to apply for certification as a nonconforming use or to reduce stock in adult material to less than twenty-five

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merchandise, and may impose other reasonable requirements deemed necessary to safeguard the health, safety, morals, and general welfare of the community.

(3) The proprietor, owner, or personnel of the establishment shall prohibit access to the premises by any person who is under eighteen (18) years old.

percent. Plaintiff chose the latter alternative. After the 1980 amendments (Council Bill 116-1980), the County asked plaintiff to reduce its adult stock to less than five percent or to obtain a special exception. However, plaintiff did not do so. On July 2, 1985, a zoning inspector examined plaintiff's store, concluded that all of the stock on display depicted sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 § 416A of the Annotated Code of Maryland, noted that plaintiff did not have a special exception, and caused plaintiff to be cited for violating the Zoning Ordinance. On September 18, 1985, the County Board of Zoning Appeals, in an Opinion and Order, ruled that plaintiff was operating in violation of the Zoning Ordinance and

required plaintiff to cease all operations by September 30, 1985. Plaintiff has not obeyed that order.

On February 7, 1986, Deslico, plaintiff's landlord, filed a suit in state court, Deslico Joint Venture v. Emmette Demmernetti, T/A 11126 Baltimore Boulevard, Inc., No. CAL 86-02239 (Circuit Court for Prince George's County), seeking to eject plaintiff because the landlord had been notified by the County that plaintiff was in violation of the Zoning Ordinance. Plaintiff then filed this action on May 5, 1986. Thereafter, on May 22, 1986, the County filed suit in state court, Prince George's County of Maryland v. Greene, No. HHF53-2667-86 (District Court for Prince George's County), seeking to enforce the September 18, 1985

Order of its Board of Zoning Appeals. The two state court actions have been stayed by the respective state courts pending the outcome of this federal case.

Plaintiff's First Amendment challenge has two prongs. First, plaintiff argues that the adult bookstore regulations were adopted without a showing that the restrictions placed on adult bookstores serve a significant state interest. Second, plaintiff asserts that the Zoning Ordinance grants too much discretion to zoning officials charged with enforcing the adult bookstore provisions. With regard to the Fifth Amendment, plaintiff asserts that the Ordinance's definition of adult bookstore requires applicants for a special exception to admit to the possession of criminally obscene

materials, in contravention of that amendment's proscription of compelled self-incrimination.

All of the predicates for a § 1983 action are present. The County is a political subdivision of the State of Maryland and, in enacting the zoning provisions challenged by plaintiff, acted as a person under color of state law. Monell v. Dep't of Social Services, 436 U.S. 658, 669 (1978).

III. Standing

The County contends that plaintiff lacks standing to bring this action under either the First or the Fifth Amendment. Plaintiff is a corporation and corporations have "no constitutional privilege against compulsory self-incrimination by virtue of the Fifth Amendment." California Bankers Ass'n v.

Shultz, 416 U.S. 21, 71 (1974). See also United States v. White, 322 U.S. 694, 699 (1944) ("[s]ince the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation"). Under the circumstances of this case, therefore, plaintiff cannot assert a Fifth Amendment claim, and the question of whether a person may incriminate himself by seeking a special exception for a bookstore as it is defined in section 27-107-1(a)(6)(A) is not reached in this opinion.[7]

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7 Whether plaintiff can vicariously assert a Fifth Amendment privilege against self-incrimination on behalf of others is a question which need not be reached since plaintiff has not requested relief on behalf of anyone other than itself.

The County argues that plaintiff lacks standing with respect to its First Amendment claim because the threat of prosecution alleged by plaintiff is merely "conjectural," not "real and immediate." See City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (citing to and quoting from earlier Supreme Court cases). The fact that plaintiff is a corporation does not affect its standing to challenge on First Amendment grounds state action which, if enforced, will have a detrimental economic impact. See Pierce v. Society of Sisters, 268 U.S. 510, 535, 536 (1925); Virginia v. American Booksellers Ass'n, Inc., ___ U.S. ___, 108 S. Ct. 636, 642 (1988); Black Jack Distributors, Inc. v. Beame, 433 F. Supp. 1297, 1302-03 (S.D.N.Y. 1973). In any event, when First

Amendment rights of freedom of expression are involved, standing requirements are usually relaxed. Broadrick v. Oklahoma. 413 U.S. 601, 611-12 (1973); Secretary of State of Maryland v. J.H. Munson, Co., 467 U.S. 947, 956 (1983).

In Valley Force Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), Justice Rehnquist outlined three minimum requirements which must be met in order for a plaintiff to satisfy the standing requirement pursuant to Article III of the Constitution. First, the plaintiff must "'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" Id. at 472 (quoting Gladstone, Realtors v. Village of Bellwood. 441 U.S. 91, 99 (1979)).

Second, the plaintiff must demonstrate that the injury "'fairly can be traced to the challenged action.'" Id. (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976)). Finally, the plaintiff must show that his grievance "'is likely to be redressed by a favorable decision.'" Id. (quoting Simon, 426 U.S. at 41). The County's Board of Zoning Appeals has ordered plaintiff to cease operating as an adult bookstore as of September 30, 1985 because plaintiff failed to comply with the challenged zoning provisions. Plaintiff is a defendant in a case brought by the County to enforce that order and is also a defendant in an eviction proceeding brought by plaintiff's landlord as a result of the zoning violation. Plaintiff therefore

faces a threat to its business survival--an immediate threat from which it can obtain redress if successful in this case. Accordingly, plaintiff has standing to press its First Amendment claims.

IV. Content-Based or Content-Neutral

The threshold inquiry in a First Amendment case involving a zoning ordinance is whether the legislation at issue is a content-based restriction, or a content-neutral time, place and manner restriction. The difference may well be outcome-determinative since the standard of review for time, place and manner restrictions is less stringent than that for content-related restrictions. "[R]egulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First

Amendment," while "so-called 'content-neutral' time, place and manner regulations are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986).

Renton involved a challenge to the constitutionality of a zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Justice Rehnquist wrote for the majority that "'content neutral' speech regulations . . . 'are [those which can be] justified without reference to the content of the regulated speech.'" Id. at

48 (quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)) (emphasis supplied in Renton by Justice Rehnquist). The district court in Renton had concluded that the Renton ordinance was "aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community." Id. at 47 (emphasis supplied in Renton by Justice Rehnquist) . Since "[t]he ordinance by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular

views," the ordinance in Renton was held by the Supreme Court to be a valid "content-neutral" regulation. Id. at 48.[8]

Under the standards enunciated in Renton, the ordinance in this case is a content-neutral time, place and manner regulation. As the legislation's preamble and various sections state, it is aimed at the adverse impact of adult bookstores upon the surrounding

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8 In Renton, Justice Rehnquist rejected the Ninth Circuit's examination of whether a motivating factor in enacting the ordinance was the restriction of the exercise of First Amendment rights since "an alleged illicit legislative motive" will not render unconstitutional "an otherwise constitutional statute." 475 U.S. at 48 (quoting United States v. O'Brien. 391 U.S. 367, 383 (1968)). In the case at bar plaintiff does not appear to challenge the motives of the County Council in enacting the adult bookstore provisions.

neighborhoods and upon children.[9] While the legislative history in the record is sparse, the little evidence which does exist does not contradict that view. The Administrative Bill Files of the 1975 ordinance and its 1980 amendments

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9 The Preamble to the original adult bookstore zoning bill (CB-156-1975) notes that the new sections it adds to the Zoning Ordinance are "for the purpose of limiting the location of adult book stores . . . in order to lessen their impact on the community."

Council Bill 116-1980, Section 1, added the following language to then-Section 27-482.1 of the Zoning Ordinance:

> (a) In order to prevent the impairment of, or detriment to, neighboring properties, including existing or potential land uses in the neighborhood, and in order to protect children who may be attracted to such establishments, the continuation of a legal, nonconforming adult book store shall only be permitted if the following requirements are met: . . .

indicate that the Council had received letters from concerned citizens and organizations arguing that adult bookstores had or would have a negative impact upon young children and upon neighborhoods. A staff person who was involved in drafting the legislation states that the concern of the Council was with the effects of the bookstores with regard to neighborhoods.[10] The record does not suggest any intent by members of the Council or others to do more than restrict the areas in the County in which adult bookstores could locate.

The language of the ordinance itself--although not entirely clear in

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10 Affidavit of Ruth Senes ¶¶ 5-6.

some important respects--also does not indicate that the Council's intent was to ban adult bookstores entirely. Section 27-248(d) of the Zoning Ordinance provided for a five-year "amortization" period for nonconforming adult bookstores to conform to the new regulations.[11] That language creates some doubt as to whether an adult bookstore could obtain a special exception after the expiration of the five-year period (July 1, 1985) or whether only those bookstores which would be able to obtain a special exception prior to July 1, 1985 could continue to operate. This section prohibiting the opening of new adult bookstores without a special exception does perhaps indicate

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11 See Section 27-248(d), quoted supra at note 6.

that the County was "concerned with restricting the message purveyed by adult[-oriented]" establishments. Young v. American Mini-Theatres, Inc., 427 U.S. 0, 82 n.4 (1976) (Powell, J., concurring). In that regard, however, the County asserts that the amortization language does not ban adult bookstores from opening after July 1, 1985, but rather required all then-existing bookstores to obtain a special permit before that date.[12] The language of the

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12 Affidavit of Barry S. Cramp ¶ 7(d). Dale C. Hutchison, chief of the zoning division of the Maryland National Capital Park and Planning Commission, stated in his affidavit that "[t]o date, [March 26, 1987] each of the three special exception applications filed for adult book stores has been denied solely because it did not meet the 1,000 foot restriction." Affidavit of Hutchison ¶ 8. Plaintiff has not contested that assertion.

ordinance is restrictive but not entirely prohibitory and permits any store with 5 percent or more of its stock in "adult" materials to continue to operate if it obtains a special exception. It also allows a bookstore whose stock has less than 5 percent of "adult" materials to operate without obtaining a special exception and irrespective of location restrictions. In sum, First Amendment expression is not completely limited by the legislation regardless of whether the store is in the 5-25 percent, or the-less-than 5 percent, category.

Even if the ordinance does not absolutely prohibit adult bookstores from operating, it might be deemed overly restrictive and violative of the First Amendment if the spatial restrictions unduly limit the areas in which adult

bookstores may operate. In American Mini-Theatres. Justice Stevens, writing for a plurality, suggested that if a zoning ordinance has the "effect of suppressing, or greatly restricting access to, lawful speech," then it may not pass muster as a valid time, place, and manner restriction. 427 U.S. at 71 n.35. In Renton. Justice Rehnquist noted that approximately five percent of the entire land area of the city would be open to use by adult theaters, providing enough potential access to survive constitutional challenge. Renton. 475 U.S. at 53. In 15192 Thirteen Mile Road. 593 F. Supp. 147, 156 (E.D. Mich. 1984), the court held that the availability of 85 sites on which adult bookstores could locate was not unconstitutionally restrictive. And in S & G News, Inc. v.

City of Southgate. 638 F. Supp. 1060, 1066 (E.D. Mich 1986), aff'd, 819 F.2d 1142 (6th Cir. 1987), the court concluded that permitting adult enterprises in C-3 zones which comprise 2.3 percent of the land area in the city provided sufficient alternative means of expression. In his affidavit Mr. Hutchison indicates that adult bookstores-along with most commercial and industrial uses--are prohibited in all residential areas, which comprise ninety percent of the land area in the County.[13] Of the 22,500 acres of land available for commercial and industrial development, 1,400 acres, or six percent, can be used for adult bookstores. Mr. Hutchison further states

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13 Hutchison Aff. ¶ 6(b).

that, taking into consideration the spatial restrictions placed upon adult bookstores, and measuring such distances in a straight line, there are twenty locations in which adult bookstores could operate.[14] Since there are only approximately seven adult bookstores currently operating in the County,[15] at least thirteen additional spots apparently exist at which adult bookstores may locate. Based upon those submissions, sufficient alternative

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14 Hutchison Aff. ¶¶ 6(c) and 7. Mr. Hutchison notes that if the 1000-foot restriction is measured along public rights-of-way, the number of areas available for use by adult bookstores would be greater than twenty. Hutchison Aff. ¶ 7.

15 Hutchison Aff. # 6(a).

avenues of communication are available. Since plaintiff has not submitted any evidence to contradict the accuracy and trustworthiness of the assertions in the affidavits and other appropriate Fed. R. Civ. P. 56 materials presented by the County, this Court concludes that the County's aim in enacting the legislation of which plaintiff complains was not to eliminate adult bookstores from operating in the County, or to regulate the content of the materials sold at adult bookstores, but rather to restrict the time, place and manner in which such stores may operate.

V. Time, Place and Manner

In United States v. O'Brien, 391 U.S. 367 (1968), Chief Justice Warren wrote that "a government regulation [of expression] is sufficiently justified if

it is [1] within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377. And in Renton, the Court concluded that the "appropriate inquiry" in time, place and manner cases is "whether the . . . ordinance is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." Renton, 475 U.S. at 50.

Zoning regulations, as such, are not unconstitutionally invalid. See Village of Euclid v. Amber Realty Co., 272 U.S.

365, 396-97 (1926); See Also Agins v. City of Tiburon, 447 U.S. 255, 261-62 (1980). Ordinances aimed at preserving the quality of urban life reflect a sufficiently substantial governmental interest to support regulation of adult theaters where no other constitutional infirmities are present. See Renton, 475 U.S. at 54; American Mini-Theatres, 427 U.S. at 71. Thus, the County clearly had the power to enact the zoning provisions at issue in this litigation.

However, the "governmental interest" test of O'Brien, 391 U.S. at 377, and Renton, 475 U.S. at 50, requires that when a legislative body decides to regulate business in the adult entertainment field, "there must be some evidence in the record to substantiate a finding that the regulated speech

produces negative secondary effects." American Booksellers Ass'n, Inc. v. Webb, 643 F. Supp. 1546, 1555 (N.D. Ga. 1986). The County contends that a standard of minimum scrutiny is applicable and that the challenged legislation is valid if a rational basis exists for its enactment. Plaintiff, on the other hand, asserts that American Mini-Theatres and Renton require strict scrutiny--a careful review of the sufficiency of the factual record before the legislative body at the time the ordinance was enacted.

In American Mini-Theatres, Justice Stevens wrote: "[T]he record disclose[d] a factual basis for the Common Council's conclusion that [the adult theater] restriction will have the desired effect." 427 U.S. at 71 (footnote omitted). The record in American Mini-

Theatres included "reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of other cities, and that could be expected in Detroit, from the influx and concentration of such establishments." Id. at 81 n.4 (Powell, J., concurring). In striking down an ordinance banning live entertainment in Schad v. Borough of Mount Ephraim. 452 U.S. 61 (1981), Justice White concluded that Mount Ephraim "has not adequately justified its substantial restriction of protected activity", Id. at 72 (footnote omitted), noting that "no evidence has been presented to establish that live entertainment is incompatible with the uses presently permitted by the Borough." Id. at 75. In Schad, Justice White

pointed to the evidence which had been before the Detroit Council in American Mini-Theatres as sufficient to meet the First Amendment burden placed on the Council with regard to regulations affecting adult movie theaters. Id. at 71-72. Further, Justice White specifically called attention to the Court's "obligation to assess the substantiality of the justification offered for a regulation which significantly impinged on freedom of speech":

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation

> of the free enjoyment of [First Amendment] rights."

Id. at 69-70 (quoting Schneider v. State, 308 U.S. 147, 161 (1939)) (footnote omitted).

In Renton, the city of Renton, Washington, situated approximately five miles outside of Seattle and part of the Seattle metropolitan area, relied upon an extensive Seattle report when it adopted an ordinance regulating adult book stores:

> The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F.2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed

> at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood.
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> . . . .
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> We hold that Renton was entitled to rely on the experiences of Seattle and other cities . . . in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here.

Renton, 475 U.S. at 50-52.[16]

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16 For lower court cases with regard to legislative reliance on experience in other areas, See International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520, 1527 (11th Cir. 1986); Genusa v. City of Peoria, 619 F.2d 1203, 1211 (7th Cir. 1980); S & G. News. Inc. v. City of Southgate, 638 F. Supp. 1060, 1066 (E.D. Mich. 1986), aff'd. 819 F.2d 1142 (6th Cir. 1987); SDJ, Inc. v. City of Houston, 636 F. Supp. 1359, 1367 (S.D. Tex. 1986), aff'd. 837 F.2d 1268 (5th Cir. 1988); 15192

In Wall Distributors, Inc. v. City of Newport News, Virginia. 782 F.2d 1165 (4th Cir. 1986), Judge Phillips held that a criminal statute which made it an offense to exhibit movies in enclosed booths was a content-neutral time, place, and manner regulation. Id. at 1168. Accordingly, Judge Phillips applied the O'Brien test to the statute, and rejected the assertion of Wall Distributors that the city did not have sufficient concrete evidence of the activities and health conditions in such booths to provide an adequate basis to support the need for such legislation. In so doing, Judge Phillips wrote:

> The decision to enact such a

Thirteen Mile Rd., Inc. v. City of Warren, 593 F. Supp. 147, 155 (E.D. Mich. 1984).

> regulation constitutes a legislative determination that closed booth showings produce side effects that are destructive of public health, decency and order. To have this determination sustained against constitutional attack, a legislature is not bound to create an evidentiary record that would pass muster on plenary judicial review of [the] legislation's necessity and fitness to achieve desired results. Judicial review goes only to whether the legislative determination of justification and fitness is not facially without factual support, hence not arbitrary and capricious.

Id. at 1169.[17] Additionally, Judge Phillips noted:

> In assessing the reasonableness of local legislative determinations of ends and means under this quite deferential standard of constitutional review, we may not confine the local legislature to only what it knows and can foresee

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17 Judge Phillips noted the affidavit of a public official concerning the discovery of a semen-like substance in arcade booths and an arrest at an arcade. That evidence seemingly was available to the legislative body at the time it adopted the ordinance at issue. See id. at 1169 n.6.

> from purely local conditions already experienced. Legislatures can no more be held bound not to know what the whole world knows than can courts; legislative notice of facts must be deemed to run at least as wide as does judicial notice. Id. at 1169 n.7.[18]

In Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980), Judge Phillips upheld a statute which required that a single building could contain no more than one adult establishment, writing that the statute furthered a substantial legislative interest:

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18 Although this statement of Judge Phillips might be interpreted to suggest that a legislature could simply "take notice" of the fact that adult bookstores are "known" to create adverse secondary effects, the holding in Renton--which was decided after Wall Distributors--that a legislature must rely on some evidence shown to be relevant to local conditions, suggests otherwise. See Renton, 475 U.S. at 5052.

> The legislature could reasonably have determined that the development of the "total, under one roof" approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the quality of life in the neighborhood. While there is no formal legislative history of the law, the record does show that the sponsor of the legislation was concerned to bring these secondary effects to the legislature's attention.

Id. at 828 (footnote omitted). In Hart, the legislative committee considering the bill did have before it a report on the results of an inspection of several adult entertainment oriented businesses in one county of the state. Id. at 82829 n.9. In the view of this Court, while the record before a legislature considering the regulation of adult book stores need not be extensive, some substantive evidence of secondary effects is

necessary.[19]

A review of the record indicates that very little, if any, evidence of the secondary effects of adult bookstores was before the County Council at the time it first acted in 1975, or when it enacted amendments in 1976 and 1980. The legislative file does show that the State's Attorney recommended enactment of zoning legislation, and that protection of neighborhoods and their residential character, and of children was a primary

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19 See Basiardanes v. City of Galveston. 682 F.2d 1203, 1215 (5th Cir. 1982); Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 661-62 (8th Cir. 1981); Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 98 (6th Cir. 1981); Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987), cert. denied. 98 L.Ed.2d 978 (1988); CLR Corp. v. Henline, 520 F. Supp. 760, 768 (W.D. Mich. 1981), aff'd. 702 F.2d 367 (6th Cir. 1983).

concern.[20] The record does not indicate that the council or its staff was concerned with limiting or suppressing the distribution of adult materials with regard to the 1980 changes. The legislative file indicates that the Mayor of Mount Rainier, Prince George's County, was concerned about revitalizing older neighborhoods; that Council members had received citizens' complaints about adult bookstores; and that the tighter 1980 requirements, including the amortization provisions, were intended to force all existing and proposed adult bookstores to comply with the special exception requirements first imposed in

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20 See Administrative Bill File for CB-156-1975.

1975.[21]

The affidavit of Ruth Senes, a Planning Commission employee who helped draft the 1975, 1976, and 1980 enactments, suggests that the County Council was concerned about "the adverse effects of adult bookstores on adjacent properties and surrounding neighborhoods," not with suppression of speech or the ideas in adult materials.[22] Senes has also stated that Council members were concerned "that adult bookstores not be located near areas where children (under age 18) would

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21 See Administrative Bill File for CB-116-1980.

22 Senes Affidavit ¶ 5.

travel or congregate."[23]

But the record contains no reference to any study conducted by or for the County with regard to the adult bookstore issue. Nor is there any reference in the record to any studies conducted by other jurisdictions which had faced similar problems. A number of citizens of the County submitted letters expressing general concerns, but there is no indication in the record that any County official investigated any of the concerns cited in the letters, or that any official briefed the Council concerning the real or probable problems generated by existing adult bookstores. Nor does the record suggest that the members of

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23 Id.

the Council relied upon any written information supplied to them or that they discussed the effect of similar efforts to regulate adult bookstores elsewhere. Public hearings and committee meetings were held.[24] But the most substantial evidence in the record from these meetings is a "Speaker's List" for what appears to be a Council hearing on April 6, 1976 regarding Council Bill 10-1976, containing eleven names.[25]

The County has submitted to this Court a stack of reports and studies regarding adult bookstore zoning regulations and an affidavit from a professional land-use planner supporting

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24 Senes Affidavit ¶ 5.

25 See Administrative Bill File CB-10-1976.

the rationality of the Council's enactment of its adult bookstore ordinances. Had the Council received those materials prior to its vote on the ordinances, its actions would appear to fall within the standards of O'Brien and Renton. But post-hoc rationalizations--materials apparently collected for use in this case and not presented to the Council before it enacted the challenged legislation-are something quite different. See Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 98 (6th Cir. 1981); Basiardanes v. City of Galveston, 682 F.2d 1203, 1215 (5th Cir. 1982). Neither the Supreme Court, nor the Fourth Circuit in Wall Distributors has suggested that a legislature can enact adult bookstore ordinances without some specific evidence of secondary

effects before it. While "[j]udicial review goes only to whether the legislative determination of justification and fitness is not facially without factual support," Wall Distributors, 782 F.2d at 1169, and legislators can be assumed to have knowledge of the experiences of other areas, Wall Distributors does not support the view that a record whose most concrete facts consist of general letters from citizens is sufficient to demonstrate a substantial governmental interest in a context in which First Amendment rights are at stake.

The third prong of the O'Brien standards, namely, whether the ordinance is aimed at the suppression of free expression, has been addressed supra. Plaintiff has not rebutted the County's

position that adult bookstores can open in the County after July 1, 1985 if they first obtain a special exception. Nor has plaintiff effectively attacked the County's estimates concerning the availability of sites for adult bookstores. Accordingly, it would appear that the challenged zoning ordinance was not aimed at suppressing free expression.

The final prong of O'Brien requires that legislation affecting free expression be narrowly tailored to minimize any incidental restrictions upon First Amendment freedoms. O'Brien, 391 U.S. at 377. The County's locational zoning regulations are not significantly different from those in Renton and American Mini-Theatres. Confining adult bookstores to certain specific commercial and industrial zones may well promote the

protection of residential areas and children, as may the 1000-foot restriction and the sign and window-blackening requirements. The County's regulations do not suffer from the defects of the ordinance in Schad, which banned live entertainment, sexually explicit or otherwise, or the ordinance in Keego Harbor, which banned adult movie theaters. Some thirteen sites remain in the County upon which new adult bookstores apparently can open. Plaintiff has not challenged the suitability of those sites for development. See Renton, 475 U.S. at 53-54.

The County's ordinance does, however, grant wide discretion to the zoning officials who must approve an adult bookstore's application for the

special exception.[26] Plaintiff challenges such broad discretion as constituting an unreviewable prior restraint.[27]

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26 Plaintiff also asserts that the Council's delegation of authority to the Zoning Hearing Examiner is itself unconstitutional. That delegation, however, does not appear improper since the statute provides for review of the Hearing Examiner's decisions by the Council, Prince George's County Code # 27-312, and since, further, any such decisions can be overturned by a state court if found to be arbitrary, capricious, or contrary to law. Schultz v. Pritts, 291 Md. 1, 11, 432 A.2d 1319 (1981).

27 The Board of Zoning Appeals denied plaintiff's request for an extension of the period in which plaintiff could file for a special exception. See Attachment, Plaintiff's Response to Prince George's County's Motion for Summary Judgment. Plaintiff thereafter apparently did not apply for a special exception. Prince George's County contends that since plaintiff failed to apply it cannot now challenge the standards used to evaluate applications for such exceptions. However, "[c]ourts hearing challenges to

In Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the Supreme Court discussed the permissible scope of a public official's discretion in the First Amendment context. In that case, Justice Stewart wrote that ar ordinance requiring a permit for a parade or procession which could be denied if the City Commission deemed a particular parade to be detrimental to the welfare, decency, or morals of the community, was unconstitutional since it gave licensing officials "extensive authority to issue

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statutes giving standardless discretion to administrative agencies when they issue licenses have not required that the plaintiff actually apply to that agency and that the agency turn down the plaintiff's application." Amico v. New Castle County, 571 F. Supp. 160, 172 (D. Del. 1983), aff'd. 770 F.2d 1066 (3rd Cir. 1985). See also Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks." Id. at 153. On the other hand, in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981), Justice White noted that a "first-come, first-served system" of awarding locations for soliciting at a state fair is "not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." Id. at 649.

Several lower federal courts have carefully scrutinized special permit

procedures in a zoning context and have discussed specific criteria designed to control the discretion of zoning officials. For example, in Amico v. New Castle County, 571 F. Supp. 160 (D. Del. 1983), aff'd, 770 F.2d 1066 (3rd Cir. 1985), Judge Wright reviewed a zoning ordinance which required adult businesses to obtain a special permit (in addition to meeting certain lineal-spatial requirements) by demonstrating that the neighborhood would not be detrimentally affected by the issuance of the permit. Judge Wright held that the ordinance was "unconstitutional because it grants the licensing authority overly broad discretion to grant or deny the license." Id. at 173. Judge wright stressed that "[t]he County Council is left to decide,...without any guidance, what will

detrimentally affect the neighborhood. Such discretion in the first amendment area is clearly not permissible." Id.

In 15192 Thirteen Mile Rd., Inc. v. City of Warren, 593 F. Supp. 147 (E.D. Mich. 1984), an ordinance permitted an adult bookstore to locate in one of four zones only if it obtained the special use approval of the City Planning Commission and the Board of Zoning Appeals. Such approval could only be granted if the adult bookstore "is not injurious to the zoning district and surrounding areas and is not contrary to the 'spirit and purpose of the ordinances.'" Id. at 150. The court held that the "indefinite general standards . . . raise the possibility that local officials could effectively prohibit any adult entertainment facility. For there to be

an effective permit requirement, a municipality must provide narrowly drawn, objective, reasonable, and definite standards to guide the administering officials." Id. at 156.[28]

The Court of Special Appeals of Maryland has recently examined certain special exception provisions in relation to adult enterprises. In that case, 5297 Pulaski Highway, Inc. v. Town of Perryville, 69 Md. App. 590, 519 A.2d 206 (1987), cert. denied, 309 Md. 521, 525 A.2d 636 (1987), Chief Judge Gilbert rejected a First Amendment

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28 The Court in 15192 Thirteen Mile Rd. noted that the ordinance approved by the Supreme Court in American Mini-Theatres did not contain a special permit procedure. Id. at 156. Nor does the opinion in Renton indicate that the ordinance therein approved contained such a procedure.

challenge to a zoning ordinance. In Perryville the zoning ordinance permitted the zoning board to authorize a "conditional use" and enumerated thirteen rather specific guidelines which the board was required to follow in determining whether to authorize a particular conditional use. 69 Md. App. at 597-98, 519 A.2d at 210-211.[29] Judge

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29 The thirteen Perryville criteria are:

> 1. The nature of the proposed site, including its size and shape and the proposed size, shape, and arrangement of structures.
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> 2. Traffic conditions including the resulting traffic patterns.
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> 3. The nature of the surrounding area and the extent to which the proposed use might impair its present and future development.
>
> 4. The proximity of dwellings, churches, schools, public structures, and other places of public gatherings.

5. The probable effect of the proposed use upon the peaceful enjoyment of people in their homes.

6. Facilities for sewers, water, schools, transportation, and other services, and the ability of the County to supply such services.

7. The limitations of fire-fighting and rescue equipment, and the means of access for fire and police protection.

8. The preservation of cultural and historic landmarks and trees.

9. The probable effect of noise, vibration, smoke and particulate matter, toxic matter, odorous matter, fire and explosion hazards, or glare upon the uses of surrounding properties.

10. The purpose and intent of this Ordinance as set forth in its other sections.

11. The most appropriate use of land and structure.

12. The conservation of property values.

13. The contribution, if any, such proposed use, building or addition would make toward the deterioration of areas and neighborhoods.

Gilbert reasoned that the guidelines were "sufficient in number and definitiveness" to overcome concern about undue discretion, particularly since any decision had to be made within a particular period of time. 69 Md. App. at 599-600, 519 A.2d at 211. Further, he noted that the Court of Appeals of Maryland in Schultz v. Pritts, 291 Md. 1, 4325 A.2d 1319 (1981), had limited the discretion of zoning officials by requiring "the zoning authority [to] find that the location would suffer unique problems 'above and beyond those' normally associated with the particular use irrespective of whether it is situated in the prescribed zone" before a

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5297 Pulaski Highway, 69 Md. App. at 597-98, 519 A.2d at 210.

requested special exception could be denied. 69 Md. App. at 602, 519 A.2d at 212 (quoting Schultz v. Pritts, 291 Md. 1, 22-23, 432 A.2d 1319 (1981)).

Prince George's County contends that its zoning officials have no discretion to deny a special exception if an applicant satisfies each zoning requirement by substantial evidence and if there is no substantial evidence to the contrary.[30] But that argument ignores the fact that the Zoning Ordinance's special exception criteria are quite vague, namely, whether a proposed use will be "in harmony" with the zoning plan (§ 27-317(a)(1)); "substantially impair" the Master Plan

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30 See Cramp Affidavit ¶ 6; Hutchison Affidavit ¶ 4.

(§ 27-317(a)(3)); "adversely affect" health, safety and welfare (§ 27-317(a)(4)); and be "detrimental" to the general neighborhood (§ 27-317(a)(5)). Those criteria are subject to possible manipulation and arbitrary application by officials who might object to the contents of the materials sold at adult bookstores. While such standards may be acceptable in the zoning of facilities such as a funeral home, Schultz, supra, they do not pass muster when they potentially restrict the location of bookstores, particularly when the legislation is enacted with as little supporting evidence as occurred in this instance. Such standards suffer from the same broad, subjective criteria which courts have found constitutionally wanting in 15192 Thirteen Mile Rd., 593

F. Supp. at 186, and in Amico, 571 F. Supp. at 173, and are much more general than the specific criteria found constitutional by the Court of Special Appeals of Maryland in 5297 Pulaski Highway, 69 Md. App. at 599-600. In essence, the County bookstore regulations leave the permit process "open to the kind of arbitrary application that [the Supreme] Court has condemned as inherently inconsistent with a valid time, place and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 649

(1981).[31] Accordingly, the County's

---

31 In addition to its other contentions, plaintiff asserts that the affidavits of Barry Cramp and Dale Hutchison indicate that the applicant for a special exception faces a potentially lengthy bureaucratic process, even before reaching the hearing examiner. A "lack of time limits . . . and . . . indefinite general standards guiding . . . discretion, raise the possibility that local officials could effectively prohibit any adult entertainment facility." 15192 Thirteen Mile Rd., 593 F. Supp. at 156.

Neither the County nor plaintiff has submitted any rules or regulations which establish time limits with regard to the special exception permit process. The affidavits of Cramp and Hutchison, two officials who are extensively involved in the special exception process, do throw light on that subject. Mr. Hutchison has outlined that process in his second affidavit and has concluded that the special exception process today normally takes about six months from the date of application to the date of the Zoning Hearing Examiner's decision. "For existing adult bookstores, I am aware that they have been allowed to continue their operations while they sought extensions of time or special exception approvals from the Board of Appeals and Planning Board." Second Hutchison Affidavit # 6. Mr. Cramp's affidavit, describing the same process, states that

special exception provisions, as applied to adult bookstores, constitute an unconstitutional prior restraint.

VI. Conclusion

---

a public hearing is usually held within six months of the date on which the application is filed. Second Cramp Affidavit ¶ 5(e).

Plaintiff has not submitted any evidence to rebut those assertions of Messrs. Hutchison and Cramp. Plaintiff has not shown that the application process for adult bookstores has generally taken longer than six months, or that adult bookstore applicants have been treated in a manner different from other classes of special exception applicants, or that six months--or one year--is an unreasonable time for processing an application. While the apparent lack of statutory time constraints is somewhat troublesome, the length of the process in and of itself would not appear to constitute a prior restraint in the light of the uncontested Cramp and Hutchison affidavits--particularly in view of Mr. Hutchison's statement that adult bookstores continue to operate while a special exception application is reviewed. Second Hutchison Affidavit ¶ 6(i).

The County's adult bookstore zoning provisions set forth in sections 27-107.1(a)(6), 27-248 and 27-331 are unconstitutional because they were enacted by the County Council without sufficient evidence to support the County's assertion of a "substantial interest" in regulating adult bookstores. The special exception provisions in section 27-317 are unconstitutional, as applied to adult bookstores, because they grant overbroad discretion to zoning officials in a First Amendment context. Accordingly, this Court will enter an order granting judgment for plaintiff and declaring the County's zoning legislation unconstitutional to the limited extent set forth in this Part VI.

Section 27-106 of the Zoning Ordinance of Prince George's County

contains the following severability provision:

> Should any provision of the Zoning Ordinance be decided by the courts to be unconstitutional or invalid, that decision shall not affect the validity of the Ordinance other than the part decided to be unconstitutional or invalid.

A similar severability clause was included in section 8 of Council Bill 156-1975, section 2 of Council Bill 10-1976, and section 9 of Council Bill 104-1976. Such a clause is valid in this case since (1) "the presence of a severability clause . . . reinforces the presumption that a legislative body would have intended to enact the valid provisions of a statute"; (2) "the dominant purpose of [the Zoning Ordinance] may largely be carried out notwithstanding the statute's partial invalidity"; and (3) the severing of the

offending statutory provisions would not appear to "impose . . . a substantial hardship" on persons not operating adult bookstores. O. C. Taxpayers For Equal Rights, Inc. v. Ocean City, 280 Md. 585, 601, 375 A.2d 541, 550 (1977). Therefore, it is only sections 27-107.1(a)(6), 27-248 and 27-331 which are being declared in this case to be unconstitutional in toto. As to section 27-317, it is being declared in this case to be unconstitutional only as applied to adult bookstores.

Senior United States District Judge
Frank Kaufman

PRINCE GEORGE'S COUNTY
ORDINANCE CB 156-1975

SECTION 1. BE IT ENACTED by the County Council of Prince George's County, Maryland, sitting as the District Council for that part of the Maryland-Washington Regional District in the Prince George's County, Maryland, that the Zoning Ordinance for Prince George's County is hereby amended by adding new language to Section 10.0 thereof to read as follows:

Section 10.0 DEFINITIONS

* * *

Adult Book Store: Any commercial establishment that has twenty-five percent (25%) or more of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations

which depict sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

* * *

SECTION 2. BE IT FURTHER ENACTED that Section 12.41 of the Zoning Ordinance for Prince George's County is hereby amended by adding a new subsection "g" to read as follows:

12.41 Continuation and Discontinuation of Use

* * *

(g) The continuation of a legal, non-conforming adult book store shall be dependent upon compliance with the requirements of subsection 27.83.

SECTION 3. AND BE IT FURTHER ENACTED that the Zoning Ordinance for Prince George's County is hereby amended by adding new language to Section 20.1 thereof to read as follows:

Section 20.0. C-1 ZONE (LOCAL COMMERCIAL, EXISTING)

* * *

Sec. 20.1 Uses Permitted

* * *

Book, newspaper, and magazine store <u>(except Adult Book Store)</u>

* * *

SECTION 6. BE IT FURTHER ENACTED that the Zoning Ordinance for Prince George's County is hereby amended by the addition of a new subsection 27.83 to read as follows:

<u>27.83 In order to prevent the impairment of, or detriment to,</u>

neighboring properties, including existing or potential land uses in the neighborhood and in order to protect children who may be attracted to such establishments, the continuation of a legal, non-conforming adult book store shall only be permitted if the following requirements are met:

a) All windows, doors and other apertures shall be blackened or otherwise obstructed so as to prevent the viewing of the interior of the establishment from without.

b) Outdoor displays or advertising shall be limited to one (1) business sign as provided for in Section 25.61.

c) The proprietor, owner and/or personnel of such establishment shall prohibit access to the premises by any person who has not attained the age of

eighteen (18) years of age.

SECTION 7. AND BE IT FURTHER ENACTED that the Zoning Ordinance for Prince George's County is hereby amended by adding a new Section 28.312 title "Adult Book Store" to read as follows:

SECTION 28.0 SPECIAL EXCEPTIONS

* * *

28.3 Specific Provisions

* * *

28.31 Uses for which Special Exceptions May Be Granted and Special Provisions Relative Thereto

* * *

28.312 Adult Book Stores

In the C-2, C-G, C-H, C-M, I-1 and I-2 zones only, and adult book store, provided that:

(a) The structure in which such use is proposed shall be at least one

thousand (1,000) feet from the nearest property line of any land in any residential zone, or any public, private, or parochial school, library, park, or playground, and at least 500 feet from the nearest property line of any church, convent, monastery, synagogue or similar place of worship;

b) Special conditions, such as, but not limited to, restrictions on advertisement, outdoor display, location of merchandise, and other reasonable requirements deemed necessary to safeguard the health, safety, morals, and general welfare of the community may be imposed by the District Council as requisite to the grant of a special exception;

(c) Such use will not impair or prove detrimental to neighboring

properties, existing or potential land uses in the general area, or the development of same.

* * *

Underscored material indicates matter added to existing law.

PRINCE GEORGE'S COUNTY
ORDINANCE CB 104-1976

Nonconforming Use: ~~[Use of building or land not in conformity with the regulations for the zoning in which the same is situated and antedating the adoption of this and/or previous Ordinances. (See) Section 2EE, Chapter 992, Laws of Md., 1943.)]~~ Use of any building, structure, or land, or portion thereof, not in conformity with a regualtion of the zone in which it is situated, including any regulation of Section 28.0 applicable to said use, which regulation was adopted subsequent to the lawful establishment of such use; or a use established after such regulation was adopted, and for which the District Council has validated a building

or use and occupancy permit, or both, issued in error. Ther term "non-conforming use" shall be deemed to include any building, structure, or other facility utilized in connection with a nonconforming use, whether such building, structure, or other facility does or does not conform to the physical requirements applicable thereto of the zone in which it is situated.

* * *

SECTION 2. BE IT FURTHER ENACTED that Section 12.4 of the Zoning Ordinance is hereby repealed and reenacted with the following amendments:

12.4 Nonconforming Buildings, Structures, and Uses

12.41 Continuation and Discontinuation of Nonconforming Buildings, Structures, and Uses

(a) Any ~~{lawful}~~ nonconforming building, structure, or use, ~~{antedating the adoption of a Zoning Plan for the area or existing as a nonconforming use when ever a map shall be changed by amendment to the Ordinance.}~~ as defined in Section 10.0, may be continued, repaired , or maintained without enlargement or extension, unless otherwise provided by this Ordinance.

* * *

(g) The continuation of a ~~{legal, nonconforming}~~ nonconforming adult book store shall be dependent upon compliance with the requirements of Subsection ~~{27.83}~~ 27.812.

(h) The continuation of a ~~{legal,}~~ nonconforming massage establishment, except where located as an ancillary use to a reducing/exercise salon or health

club, shall be dependent upon compliance with the requirements of Subsection ~~[27.84]~~ 27.813.

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MAY 11 1990
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CLERK

NO. 89-1177

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

11126 BALTIMORE BLVD., INC.

(T/A WARWICK BOOKS),

Petitioner,

v.

PRINCE GEORGE'S COUNTY, MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Respondent is dissatisfied with the questions presented for review as set forth in the Petition for a Writ of Certiorari and submits the following as substitutions:

I. DOES THE FIRST AMENDMENT BAR THE CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES BY A ZONING ORDINANCE WHICH INCLUDES CRITERIA SUCH AS: HARMONY WITH ZONING PLANS; AFFECT ON HEALTH, SAFETY AND WELFARE OF NEIGHBORING RESIDENTS; AND DETRIMENT TO ADJACENT PROPERTIES OR THE GENERAL NEIGHBORHOOD?

II. DOES THE FIRST AMENDMENT BAR THE CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES BY A ZONING ORDINANCE WHICH PROVIDES FOR PUBLIC HEARINGS AND PLACES THE BURDEN OF PROOF ON APPLICANTS?

III. DOES THE FIRST AMENDMENT BAR THE CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES BY A ZONING PROCESS THAT NORMALLY TAKES SIX MONTHS, THAT GENERALLY ALLOWS CONTINUED OPERATION OF BOOKSTORES DURING

THE APPLICATION PROCESS, AND THAT PROVIDES FOR JUDICIAL REVIEW?

IV. IN ENACTING A CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES DID THE COUNTY COUNCIL HAVE A SUFFICIENT LEGISLATIVE BASIS FOR ACTION, AND MAY IT TAKE NOTICE OR ASSUME MATTERS OF COMMON KNOWLEDGE AND EXPERIENCE?

V. DOES THE FIRST AMENDMENT BAR A ZONING ORDINANCE WHICH CONFINES ADULT BOOKSTORES TO CERTAIN COMMERCIAL AND INDUSTRIAL ZONES AND IMPOSES SETBACK, SIGN AND WINDOW-BLACKENING REQUIREMENTS, WHEN THERE REMAIN NUMEROUS ALTERNATE SITES AVAILABLE FOR SUCH BOOKSTORES?

VI. DOES THE FIRST AMENDMENT REQUIRE THAT A COUNTY PROVIDE "GRANDFATHER" STATUS TO PRE-EXISTING ADULT BOOKSTORES WHEN ENACTING A VALID CONTENT-NEUTRAL ZONING ORDINANCE?

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STATEMENT OF THE CASE

The Prince George's County Council enacted zoning regulations governing adult bookstores in 1975, and modified those regulations in 1976 and 1980, 1987 and 1988.[1] Council Bill 156-1975, enacted on November 18, 1975, set forth the purpose of the adult bookstore legislation and established the standards to which such stores are required to conform. The preamble to the 1975 bill stated, in part, that its purpose was to "limit the location of

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[1] This case deals with the 1987 ordinance, since the 1988 revisions were made merely to conform the ordinance with the District Court's decision in this case. Except where specifically stated to the contrary, all references are to the 1987 version of the adult bookstore ordinance, since most of the revisions involved minor changes to the ordinance.

adult bookstores" to certain commercial zones, to require a special exception before a bookstore could be located in those commercial areas specifically zoned for adult bookstores, and to require "that [then] existing adult bookstores be modified in order to lessen their impact on the community." An adult bookstore was defined as

> Any commercial establishment that has twenty-five percent (25%) or more of its stock in books, periodicals, photographs, drawings, sculpture, motion pictures, films or other visual representations which depict sadomasochistic abuse, sexual conduct or sexual excitement as defined by Article 27 Section 416A of the Annotated Code of Maryland and does not otherwise qualify as a theatre or nonprofit free lending library.

Council Bill 156-1975 § 1. In 1980, that definition was changed by reducing the stock percentage from 25 to 5 percent. Council Bill 116-1980.

The County's Zoning Ordinance generally provides that a special exception (including an application for an adult bookstore) may be approved if:

(1) The proposed use and site plan are in harmony with the purpose of this subtitle;
(2) The proposed use is in conformance with all the applicable requirements and regulations of this subtitle;
(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
(4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area; and
(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood.

Prince George's County Code § 27-317.

The Zoning Ordinance also placed specific operational and locational

conditions on adult bookstores, including set-back restrictions (limiting proximity to schools, libraries, parks, playgrounds, and churches), sign and advertising limitations, and window-blackening requirements. County Code §§ 27-248 and 27-331.

The court of appeals concisely and clearly described the "special exception" process as applied in zoning cases, including those for adult bookstores.

> Briefly, a special exception application begins with a review for compliance with zoning ordinances by the Technical Staff in the Zoning Division of the Planning Commission which issues a "Technical Staff Report" recommending approval, conditional approval or denial of the application. The application may be passed on to the County Planning Board and then reviewed in a public hearing before a Zoning Hearing

> Examiner. A Hearing Examiner's written decision may be appealed to Prince George's County Council, sitting as the District Council. The Council entertains oral argument and reviews the administrative record before making a final decision. the Council's final decision may be appealed to the Circuit Court for Prince George's County.

11126 Baltimore Blvd. v. Prince George's County, Maryland, 886 F.2d 1415, 1418 (4th Cir. 1989), set forth at APX.10.

Petitioner's bookstore began operations in June, 1975. APX. 89. After the first adult bookstore ordinance was passed, the petitioner reduced its stock in adult material to less than 25% so as to avoid classification as an adult bookstore. APX. 89-90. After the 1980 amendments, the County asked petitioner to reduce its adult stock to less than five percent or to obtain a special

exception, but petitioner did not do so. APX. 90. On July 2, 1985, the petitioner was cited for violating the ordinance when an inspection concluded that all of the stock on display was within the defined description and that petitioner did not have a special exception. APX. 90. On September 18, 1985, the Board of Zoning Appeals found there to be a violation and ordered petitioner to cease operation as an adult bookstore. APX. 90-91.

Petitioner appealed that order to the Circuit Court for Prince George's County. Petitioner's landlord filed an eviction action after receiving notice of the zoning violation, and the County filed court actions against both the petitioner and its landlord to enforce the Board of Zoning Appeals order. APX.

91-92. Petitioner then filed the present action in the United States District Court, and all other proceeding were stayed pending resolution of this case. APX. 92.

The district court found that the ordinance was a valid, content-neutral, "time, place and manner" regulation of such businesses. 11126 Baltimore Blvd. v. Prince George's County, 684 F.Supp. 884, 893 (D.Md. 1988), set forth at APX.110. However, the district court ruled that the ordinance was unconstitutional in two respects. First, the district court held that, while sufficient evidence exists to substantiate a finding that such businesses have negative secondary effects and the ordinance was directed at addressing these negative secondary

effects, the County Council had not received all this evidence prior to its vote, so the ordinance was unconstitutional. APX.126-127. The district court also struck down the ordinance because the criteria established for issuance of a special exception were vague and "subject to possible manipulation and arbitrary application by officials who might object to the contents of the materials sold at adult bookstores." APX.141.

The U.S. Court of Appeals for the Fourth Circuit then examined the ordinance in depth and found it to be completely constitutional. APX.1-68. After agreeing with the district court's finding that the ordinance was a content neutral time, place and manner regulation, APX.22, the court of appeals

addressed the sufficiency of the legislative basis for the regulation. After reviewing other cases on this issue, the court of appeals concluded that "there was less evidence before the City of Renton when its ordinance was enacted [subsequently upheld in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986)] than in the record developed by Prince George's County when it enacted and amended the challenged ordinances." APX.37. As for the evidence submitted in the district court but not received by the County Council prior to its vote, the court of appeals observed that

> cursory review of the case law reveals that courts have routinely admitted evidence at trial to supplement a legislative record or explain the stated interest behind challenged regulations. It would appear from reviewing the Renton case, for example, that testimony of this nature was admitted at

trial and considered on appeal. APX.47. Thus, the court of appeals held "that the County sufficiently demonstrated substantial governmental interest in its regulations." APX.49-50.

On the issue of vague criteria subject to manipulation, the court of appeals was "persuaded by the language of the challenged ordinances, the evidence in the record, and Maryland case law that the special exception requirements...do not confer unbridled discretion upon County Council and zoning administrators." APX.60. Thus, the judgment of the district court was reversed, and the ordinance found to be constitutional. APX.68. The petitioner now asks this Court to review that decision by way of writ of certiorari.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fourth Circuit is in harmony with decisions by this Court and other federal courts of appeals. Thus, the Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE ZONING STANDARDS AT ISSUE DO NOT OFFEND THE FIRST AMENDMENT BY GRANTING OFFICIALS UNDUE AND ARBITRARY DISCRETION TO DENY SPECIAL EXCEPTIONS FOR ADULT BOOKSTORES.

After reviewing the County adult bookstore and special exception ordinances, the evidence in the record, and applicable Maryland case law, the court of appeals held that the ordinances do not grant "zoning administrators and the District Council undue and arbitrary discretion to deny special exceptions to adult bookstores." APX.68 This conclusion was based, in large part on the

> [c]omprehensive, uncontroverted affidavits submitted by the Chief Zoning Hearing Examiner in Prince George's County, Barry S. Cramp, and the Chief of the Zoning Division of the Maryland National

> Capital Park and Planning Commission, Dale C. Hutchison, [which] explained in detail the review process for zoning and special exception applications in Prince George's County. As for the general requirements, pursuant to § 27-317 [of which petitioner complains as being too vague], a special exception applicant must demonstrate that the proposed use will not harm adjacent properties or the neighborhood by creating undue noise, conditions of blight, traffic congestion, unsafe conditions or similar problems. The general requirements of § 27-317 are satisfied by witnesses for the applicant explaining the proposed use and addressing specifically any problems, such as traffic, which are apparent from the application, the Technical Staff Report, or other evidence in the record.

(APX.57-58, emphasis added). Petitioner now argues that this decision conflicts with those of the federal courts of appeals for the First and Seventh Circuits. However, close review of the cases cited reveals that this is not true.

Perhaps the most clearly distinct case among these cited is Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980). Contrary to petitioner's claim, the Maciejewski decision did not turn on the specificity of guidelines in a content neutral, time, place and manner regulation -- it was a full-scale attack on an absurdly indefensible ordinance. As the Seventh Circuit noted,

> the entire adult movie zoning ordinance is nothing more than a one-line addition to the list of permitted and special uses in the Village of Westmont's zoning ordinance. Nothing that could be called a "legislative history" accompanies the ordinance. ...[I]t contains no definition of the term "adult"...The ordinance also gives no standards for its application by those who administer it...The only limitation is the "purpose" section[s] of the zoning ordinance...[which] simply define

two classes of special uses and do not provide any guidance whatsoever.

Id at 501-02. Furthermore, the court observed that the "Village of Westmont does not even attempt to advance a legitimate governmental interest to support the zoning ordinance. The Village admits in its brief that it enacted the ordinance to 'regulate the showing of sexually explicit movies'." Id at 504. Thus, the court concluded that "the ordinance satisfies none of the requirements for constitutional regulation of 'adult' fare under Young v. American Mini Theatres [427 U.S. 50 (1976)]." Maciejewski at 505. The language cited by petitioner, that the Maciejewski judges "doubt that any special use scheme for regulation of adult movie theatres would be

constitutionally valid," Id at 504, is obviously dicta and hyperbole. Comparing that statement with the complete, well-reasoned and specific decision by the Fourth Circuit in the instant case borders on the absurd, and certainly does not justify the extraordinary relief sought by the petitioner.

Petitioner also claims that the decision of the Fourth Circuit in this case conflicts with that of the Seventh Circuit in Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980). Specifically, the petitioner claims that the Genusa court "invalidated an adult bookstore zoning ordinance because it required an applicant's premises to pass various municipal inspections prior to licensure that were not required for non

adult bookstores." (See, Petition at pp. 20-21). This grossly misstates the holding in Genusa, in which appellants challenged various zoning, licensing and employee permit restrictions on the operation of adult bookstores. The court held that the plaintiffs-appellants lacked standing to challenge the zoning provisions, except for the requirement that adult uses be separated by 500 feet, which it upheld pursuant to Young, supra. Genusa at 1211-12. Thus, it never addressed the degree to which any zoning criteria were so vague as to confer unbridled discretion on officials. The provisions ruled to be unconstitutional related to various license requirements for inspections, police investigations, applicant disclosures, and employee permits. Id

at 1221. As none of these provisions deal with the same matters as the instant case, there is no conflict.

The First Circuit case cited by petitioner is also not concerned with a zoning ordinance, but with a licensing provision. Fantasy Book Shop v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) struck down a public amusements licensing ordinance challenged by "three adult bookstores offering coin-operated motion pictures for pay in the City of Boston." Id at 1118-19. It should be noted that the petitioner again misstates the holding of the case as invalidating the ordinance "for vagueness and overbreadth" (Petition at 20), since the court explicitly declined to address an overbreadth analysis. Fantasy Book Shop at 1122-23, n. 9.

And, again, the decision is distinguishable from that in the instant case. Fantasy Book Shop involves a licensing scheme which set forth four criteria for denial of a public amusement license; two of which were that the license would increase the incidence of disruptive conduct in the area and that it would "otherwise significantly harm the legitimate protectable interests of the affected citizens of the city." Id at 1119. The First Circuit upheld the former criteria while striking down the latter under the theory that "the 'disruptive or illegal conduct' standard...serves as a necessary shorthand for a variety of particular objective occurrences, [but] this 'public interest' standard comprises purely subjective evaluations

of wholly unrestricted factors." Id at 1123. Although the distinction made is not obvious at that point of the decision, it becomes so when one recalls that the First Circuit explained it was determining the case "by a fact-specific examination of actual decisions, and not from the face of the ordinance." Id at 1122. Primary among the facts asserted by the plaintiff-appellants and adopted by the court were the "ongoing publicly-stated efforts" by the Mayor to eliminate the Combat Zone (a downtown Adult Entertainment District) and to "remove five pornographic outlets from the city" by rehabilitating the building in which the plaintiff-appellants were located. Id at 1119 and 1124. This is far different from the decision in the instant case. Indeed, the First

Circuit's "necessary shorthand" characterization, used in approving the "disruptive or illegal conduct" criterion, is in close accord with the Fourth Circuit's recognition that the special exception requirements "have unambiguous meanings" for zoning officials as set forth in the uncontroverted affidavits. APX.57, 68. Thus, the two decisions are more in accord than conflict.

Although much later in its argument, the petitioner also refers to a conflict with a Maryland Court of Special Appeals decision, which seems most appropriate to address here. In Landover Books v. Prince George's County, Maryland, 81 Md. App. 54, 566 A.2d 792 (1989), the Court of Special Appeals reviewed the same

ordinance at issue here and agreed with the Fourth Circuit analysis on all but one aspect -- the special exception criteria. The state court opined that it was "not persuaded by the rationale employed by the Fourth Circuit since it ignores the fact that some of the standards used in the process are vague," preferring instead the guidelines described in its previous opinion, 5297 Pulaski Highway, Inc. v. Town of Perryville, 69 Md. App. 590, 519 A.2d 206 (1987). Id at 78-79, 566 A.2d at 805-06. Again, the purported conflict is of little or no import when given closer analysis. Compare, for example, the valid criterion of "The purpose and intent of this Ordinance as set forth in its other sections," 5297 Pulaski Highway at 597-98, 519 A.2d 206, with the invalid criterion of "The

proposed use is in conformance with all the applicable requirements and regulations of this Subtitle." APX.8. Or, "The nature of the surrounding area and the extent to which the proposed use might impair its present and future development," Ibid, with "The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood." APX.9. The differences are negligible and certainly not so "special or important" as to justify review on writ of certiorari. It should be noted, in addition, that even were there a substantial conflict, this still would not come within the ambit of Rule 17.1(a), since the Court of Special Appeals of Maryland is an intermediate appellate court, Md. Cts. & Jud. Proc. Code, § 1-401, and not the

state court of last resort. See, e.g., Md. Cts. & Jud. Proc. Code § 1-301.[2]

II. THE FIRST AMENDMENT DOES NOT BAR THE REGULATION OF ADULT BOOKSTORES BY A ZONING PROCESS WHICH PROVIDES FOR PUBLIC HEARINGS AND PLACES THE BURDEN OF PROOF ON THE APPLICANT.

The petitioner sets forth as a Question Presented for review the following:

> Does the Prince George's County adult bookstore zoning law impose an unreviewable prior restraint forbidden by the First Amendment, because it requires an applicant for a zoning license for an adult bookstore to obtain a special exception through a multi-tiered administrative process that requires the applicant to sustain the burden of proof by

[2] Likewise, the four lower court decisions cited by petitioner in footnote 9, pp. 18-19, are of no avail to its argument. Although each can be distinguished, reconciled or explained, that would be redundant at this point.

> substantial evidence at an adversary, public hearing at which any member of the community can appear as an interested person with standing in the proceeding to offer evidence and oppose the application?

Petition at i. Although the question as presented is unclear, it appears that the petitioner is objecting to the use of public hearings in the zoning process and the allocation of the burden of proof on the zoning applicant. This position is not addressed in the petitioner's argument, and respondent is unaware of any case law to support it.[3]

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[3] Freedman v. Maryland, 380 U.S. 51, 58-60 (1965) does require a motion picture censorship board to bear the burden of going to court to suppress speech and, once there, to bear the burden of proof. However, this Court recently refused to extend this requirement to a licensing scheme directed at sexually oriented business since such a scheme "does not present the grave 'dangers of a censorship system'." FW/PBS, Inc. v. City of Dallas, 493 U.S. ___, ___, 110 S.Ct. 596, 606, 107 L.Ed. 2d, 603, 620 (1990).

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE FIRST AMENDMENT DOES NOT BAR THE CONTENT-NEUTRAL REGULATION OF ADULT BOOKSTORES BY A ZONING PROCESS THAT NORMALLY TAKES SIX MONTHS, GENERALLY ALLOWS CONTINUED OPERATION OF BOOKSTORES DURING THE APPLICATION PROCESS, AND PROVIDES FOR JUDICIAL REVIEW.

The court of appeals decided that, although not every step of the administrative review process is bound by precise time limits, the uncontroverted facts show that application process for adult bookstores normally take six months, that the bookstores are generally allowed to continue operation while the application process continues, that six months is not an unreasonable time for processing an application and that there is no evidence that adult bookstores are treated differently from other special

exception applicants. APX.63-64. Petitioner now challenges these findings.

First, the petitioner asserts that "the process of administrative and judicial review can take over three years." Petition at 16. However, this assertion is unsupported by the citations to the record set forth in the petition, and is directly contradicted by the observations of both the district court and the court of appeals that petitioner failed to show the process has taken longer than six months. APX.143-144, 63-64. Likewise, the petitioner's claim that there is no provision "for expeditious judicial review," Petition at 21, is simply wrong. Maryland law is clear that the Prince George's County Council, when

sitting as the District Council in a zoning matter, is an "administrative agency" subject to the provisions of Maryland Rules of Procedure, Subtitle B. County Council v. Carl M. Freeman Associates, 281 Md. 70, 376 A.2d 860 (1977). Those rules, which "apply to the review of any final action of an administrative agency by a court," Rule B1, are replete with specific time limits. See, e.g., Maryland Rules B4, B7, B9, B12.

On top of these two gross misstatements as to the facts and law, the petitioner claims that the decision of the court of appeals directly conflicts with this Court's decision in FW/PBS, Inc. v. City of Dallas, 493 U.S. ___. However, the record on specific time limits is sparse, and petitioner

has indicated to the district court his desire to reopen the case in light of FW/PBS if his petition for writ of certiorari is denied. See, Appendix A to this Brief. Thus, even if there were a possible conflict, the issue is not ripe yet for full presentation before this Court, and the petition should be denied.

IV. THE COURT OF APPEALS PROPERLY HELD THAT THE COUNTY COUNCIL HAD A SUFFICIENT LEGISLATIVE BASIS FOR ACTION, AND THAT THE COUNCIL MAY TAKE NOTICE OR ASSUME MATTERS OF COMMON KNOWLEDGE AND EXPERIENCE.

Petitioner next argues that the decision of the court of appeals conflicts with that of the district court, and the cases relied upon therein, on the sufficiency of a legislative basis for action. As described above, the district court had before it "a stack of

reports and studies regarding adult bookstore zoning regulations and an affidavit from a professional land-use planner supporting the rationality of the Council's enactment of its adult bookstore ordinances." APX.126. The district court readily admitted that these materials adequately met the standards set by this Court in United States v. O'Brien, 391 U.S. 367 (1968) and City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1968), but refused to consider them as part of the legislative basis for the ordinance since the Council had not "received those materials prior to its vote." APX.127, citing Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981) and Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982).

The court of appeals closely examined the evidence before the City in Renton and found the evidence before the County in this case to be equally sufficient. APX.31-38. More importantly, the court of appeals properly found that the actual legislative record could be supplemented with "matters of common knowledge and experience," such as the material submitted to the district court. APX.38-40. The Keego Harbor and Basiardanes decisions do not support a rejection of this ruling.

In both cases, the ordinance at issue "effectively bans" adult theatres, Keego Harbor at 98 and Basiardanes at 1207, unlike the "incidental" burden on such protected activity present in the instant case and approved in Young v.

American Mini Theatres, Inc., 427 U.S. 50 (1976). Furthermore, and again unlike this case, the Keego Harbor and Galveston councils enacted the ordinances with a virtual "dearth of information," Keego Harbor at 98, and an "empty record", Basiardanes at 1215. Finally, and vastly different from the case at bar, Keego Harbor and Galveston presented little or no additional evidence at trial to support their claimed governmental interests. See, Keego Harbor at 98 ("the bulk of the evidence was presented by a City Planner who admitted having no special expertise with the effects of placement of adult theatres") and Basiardanes at 1215-16 ("at trial, Galveston offered no evidence of what vices would flourish if adult theaters were allowed

downtown....No evidence was introduced to supplement or bolster the City Council's assumption that one adult theater located downtown and urban blight are linked.")/4 The same is true of the only other case cited by petitioner, Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981), wherein there was no evidence to support the city finding that "the prohibition of certain sexually explicit films in

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/4 Another distinction, of lesser importance on this issue but somewhat revealing, is that both cities singled out adult theaters while having few if any zoning restrictions on such businesses as bars, pool halls, pawn shops, or massage parlors. Keego Harbor at 96 and 98, Basiardanes at 1216. Prince George's County, on the other hand, has special exception requirements for almost 100 various uses, ranging from abrasives manufacturing to country inns, and mini-warehouses to tourist cabin camps. See, generally, County Code, §§ 27-329 to 27-418.

specific areas of the City is immediately necessary and desirable." Id at 661.

V. THE COURT OF APPEALS PROPERLY ANALYZED THE ADULT BOOKSTORE ZONING ORDINANCE AS CONFORMING WITH THE FIRST AMENDMENT.

The petitioner contends that the court of appeals "did not analyze under O'Brien whether the special exception process serves a significant state interest and is narrowly drawn so as to render any incidental restriction upon First Amendment freedoms no greater than necessary." Petition at 26-27. However, there is no argument presented on this point, so respondent cannot adequately address the petitioner's contention. Respondent merely directs the Court's attention to the lengthy O'Brien analysis in the opinion below. APX.24-55.

VI. PETITIONER'S PLEA FOR "GRANDFATHER" STATUS IS UNSUPPORTED AND NOT PROPERLY THE BASIS FOR ISSUANCE OF A WRIT OF CERTIORARI.

Finally, the petitioner contends that the court of appeals "did not analyze under O'Brien that the revocation by ordinance CB 116-1980 of the 'grandfather' status previously afforded to adult bookstores existing prior to the enactment of CB 156-1975 and that the stated purpose of CB 116-1980 was the 'amortization of non-conforming adult bookstores'." Petition at p. 26. Once again, there is no argument, explanation or authority presented in support of this contention. Thus, it is impossible for respondents to reply.

However, it should be noted that the only mention of this issue made by

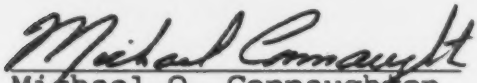
petitioner before the court of appeals was the following sentence: "There is nothing to substantiate the need to remove the grandfather status from adult bookstores predating CB 156-1975, a status expressly conferred upon them by CB 156-1975 and CB 104-1976." Appellee's Brief at p. 20. If this issue was not substantial enough to fully brief below, it certainly is not so "special and important" as to justify issuance of a writ of certiorari.

CONCLUSION

For the reasons set forth above, the respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL P. WHALEN
COUNTY ATTORNEY
PRINCE GEORGE'S COUNTY, MD

By: 
Michael O. Connaughton
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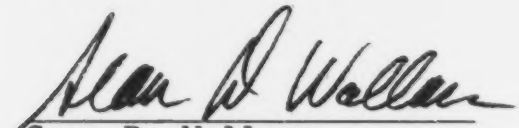
Counsel of Record

By: 
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APPENDIX A

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March 2, 1990

HAND DELIVERED

Honorable Frank A. Kaufman
United States District Court
for the District of Maryland
101 West Lombard Street
Baltimore, Maryland 21201

Re: 11126 Baltimore Boulevard, Inc.,
v. Prince George's County of Maryland, et al.
No. 89-1177, October Term 1989

Dear Judge Kaufman:

By memorandum dated February 4, 1990, the Court has requested that counsel for the Plaintiff inform the Court concerning the status of this case.

On January 23, 1990, the Plaintiff filed a Petition for Writ of Certiorari with the Supreme Court of the United States. A copy is enclosed. The Petition is presently pending. Additionally, should the Petition be denied, the Plaintiff intends to apply to this Court to reopen the case based on FW/PBS, Inc. v. City of Dallas, 58 U.S.L.W. 4079 (U.S. Jan. 9, 1990) (licensing schemes for adult establishments, including adult book stores, must provide reasonable time limits for the decision making process and for expeditious judicial review).

Thank you.

Very truly yours,

Howard J. Schulman

HJS:cat
Enclosure
cc: Michael O. Connaughton, Esquire
without enclosure

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